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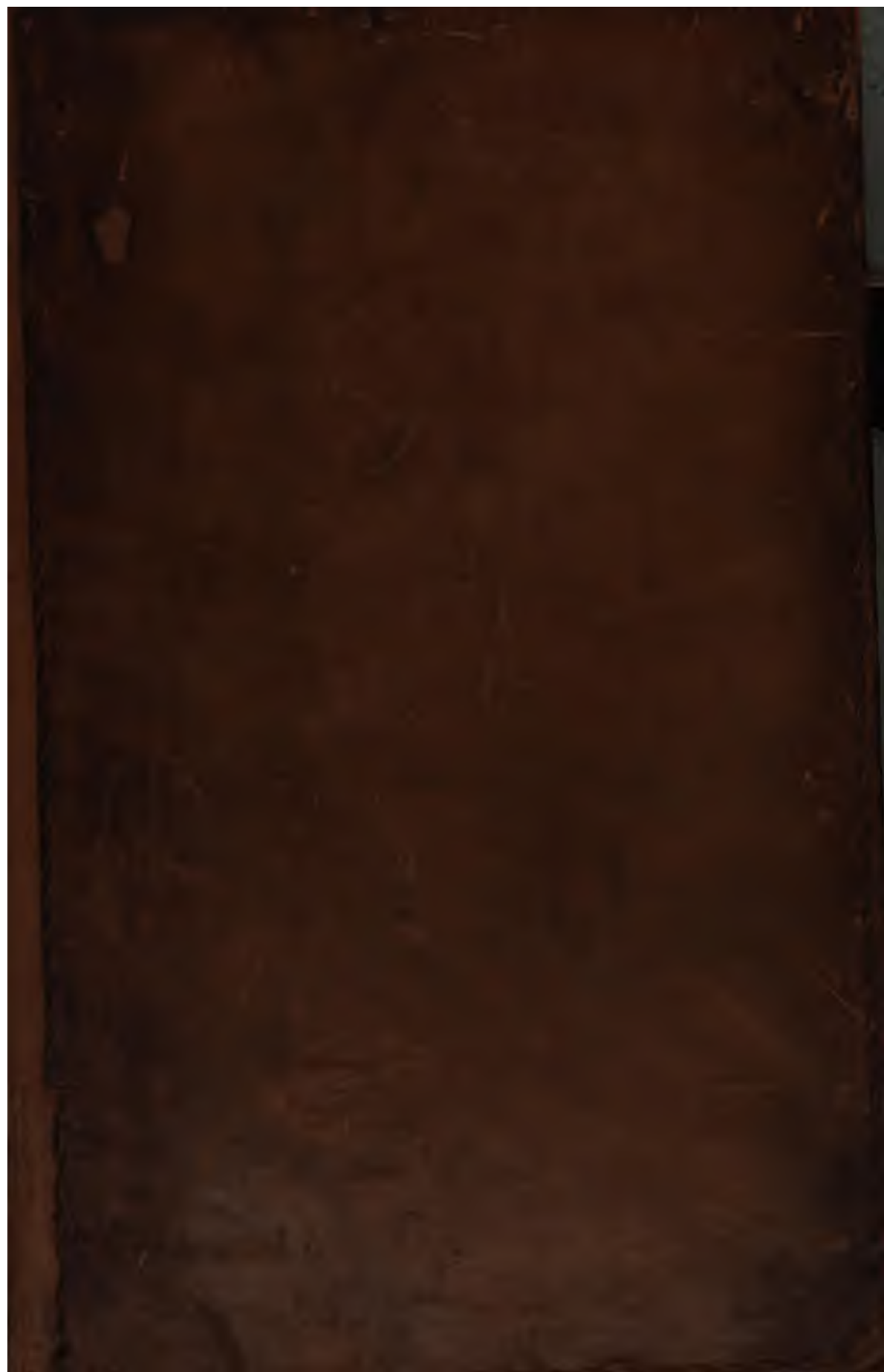
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
BEFORE
THE COMMITTEES
OF HIS MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,
APPOINTED TO HEAR APPEALS AND PETITIONS.

BY JEROME W^M KNAPP, D.C.L.
BARRISTER AT LAW.

1829 to 1831.

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C A S E S

ARGUED AND DETERMINED

BEFORE THE

LORDS OF THE PRIVY COUNCIL.

BY PETITION FROM BOMBAY.

IN RE THE JUSTICES OF THE SUPREME COURT OF
JUDICATURE.

14th May
1829.

THIS Case arose on the petition of Sir John Peter Grant, Knight, only surviving justice of the Supreme Court of Judicature at Bombay. It stated that by letters patent of the 8th of December, in the fourth year of the present reign, his Majesty was pleased to grant, direct, ordain and appoint, that there should be within the settlement of Bombay a Court of Record, which should be called the Supreme Court of Judicature at Bombay; and did thereby create, direct and constitute the said Supreme Court of Judicature at Bombay to be a Court of Record, and that the same should consist of, and be holden by and before, one principal Judge, who should be and be called the Chief Justice of the

The Supreme Court of Bombay has no power to issue a writ of *habeas corpus* except when directed to a person resident within those local limits wherein it has a general jurisdiction, or to a person out of those limits who is personally subject to its jurisdiction.

The Supreme Court has no power to issue a writ of *habeas*

corpus to the gaoler or officer of the native court as such officer, it having no power to discharge persons imprisoned under the authority of a native court.

The Supreme Court is bound to notice the jurisdiction of a native court without having it set forth specially in the return to a writ of *habeas corpus*.

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Supreme Court of Judicature at Bombay, and two other judges, who should be and be called the puisne Justices of the Supreme Court of Judicature at Bombay.

And that the said chief Justice and the said puisne justices should severally and respectively be, and they were all and every of them thereby appointed to be, justices, and conservators of the peace, and coroners, within and throughout the settlement of Bombay, and the town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and all the territories which then were, or thereafter might be, subject to or dependent upon the Government of Bombay aforesaid, and to have such jurisdiction and authority as his Majesty's justices of his Majesty's Court of King's Bench had and might lawfully exercise within that part of Great Britain called England, as far as circumstances would admit.

And that the said Supreme Court of Judicature at Bombay should have and use, as occasion might require, a seal bearing a device or impression of his Majesty's royal arms; and that all writs, summonses, precepts, rules, orders, and other mandatory process to be used, issued or awarded by the said Supreme Court of Judicature at Bombay, should run and be in the name and style of his Majesty, and be sealed with the seal of the said Supreme Court.

And that the King by the said letters patent constituted and appointed Sir Edward West, knight, then recorder of Bombay, to be the first chief justice, and Sir Ralph Rice, knight, then recorder of Prince of Wales's Island, and Sir Charles Harcourt Chambers, knight, to be the first puisne

justices of the said Supreme Court of Judicature at Bombay.

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And the King did further direct, ordain and appoint a certain jurisdiction to appertain to the said Supreme Court of Judicature, for the hearing and determining of suits and actions arising in the territories subject to or depending upon the said government, subject to certain provisos, exemptions, and declarations in the said letters patent mentioned, and did appoint a certain form of proceeding for the commencing, prosecuting, hearing and determining such civil suits and actions, and for the awarding and issuing of execution on the judgments pronounced therein.

And that the King was also pleased to grant, ordain, and appoint, that the said Supreme Court should be a court of equity, and have equitable jurisdiction over the persons in the said letters-patent described, and should be a court of oyer and terminer, and gaol delivery in and for the town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and also a court of ecclesiastical jurisdiction within and throughout the town and island of Bombay and the limits thereof; and further, that the said Supreme Court should be a Court of Admiralty in and for the said town and island of Bombay and the limits thereof, and the factories subordinate thereto, and all the territories which then were or thereafter might be, subject to or dependent upon the said government.

And that the said Sir R. Rice, knight, resigned the office of senior puisne justice of the said Supreme Court of Judicature at Bombay, in November 1827, when the said Sir C. H. Chambers became senior

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puisne justice thereof; and the said Sir R. Rice having resigned his office, the petitioner was by letters patent of the 30th of August 1827, appointed one of the puisne justices of the said Supreme Court in his room: and that he took his seat as such at Bombay, on the 9th day of February 1828.

And that the said chief justice Sir Edward West departed this life on the 18th of August 1828; and that on the 3d day of October in that year a letter was addressed:

“ To Sir C. H. Chambers, and the petitioner,
 “ as puisne justices of the Supreme Court
 “ of Judicature, dated Bombay Castle,
 “ 3d October 1828, and signed, by John
 “ Malcolm, the Governor; T. Bradford,
 “ Lieutenant-general, Commander of the
 “ Forces; J. J. Sparrow, and John Romer,
 “ the Second and Third Members of the
 “ Council,”

Which letter was of the following tenour:

“ Honourable Sirs:

“ We are quite aware that we transgress upon
 “ ordinary forms in addressing this letter to you;
 “ but the circumstances under which we are placed
 “ will, we trust, justify this departure from usage,
 “ and our knowledge of your private and public
 “ characters lead us to hope, that what we state will
 “ be received in that spirit, in which it is written;
 “ and that, notwithstanding your strict obligations
 “ to fulfil every part of your high and sacred duty
 “ as British Judges, you will, on this extraordinary
 “ occasion, deem yourselves at liberty to consider
 “ as much the objects, as the rules of the court
 “ over which you preside; and viewing the inten-

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“ tion of the Legislature in its institution, as directed
 “ to the aid and support of the Government intrusted
 “ with the administration of this Presidency, you
 “ will, for a short period, be induced by our repre-
 “ sentations to abstain from any acts (however legal
 “ you may deem them) which, under the measures,
 “ we have felt ourselves compelled to take, and
 “ which we deem essential to the interests com-
 “ mitted to our charge, must have the effect of pro-
 “ ducing open collision between our authority and
 “ yours, and by doing so, not only diminish that
 “ respect in the native population of this country
 “ which it is so essential to both to maintain, but
 “ seriously to weaken, by a supposed division in
 “ our internal rule, those impressions on the minds
 “ of our native subjects, the existence of which is
 “ indispensable to the peace, prosperity, and per-
 “ manence of the Indian empire. This conclusion
 “ refers to a variety of circumstances which we are
 “ equally forbid from explaining as you are from
 “ attending to such explanation; but we deem it
 “ necessary to state our conviction of the truth of
 “ what we have asserted, expecting that it may have
 “ some weight with you as connected with the pre-
 “ servation of that strength in the Government, which
 “ in all our territories, and particularly those we have
 “ so recently acquired, is the chief, if not the only
 “ power we possess for maintaining that general
 “ peace, on the continuance of which the means of
 “ good rule, and of administering law under any
 “ form, must always depend.

“ 2. In consequence of recent proceedings in the
 “ Supreme Court, in the cases of Moro Ragonath

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“ and Bappoo Gunness, we have felt compelled,
 “ for reasons which we have fully stated to our
 “ superiors, to direct that no further legal proceedings
 “ be admitted in the case of Moro Ragonath; and
 “ that no returns be made to any writs of *habeas*
 “ *corpus* of a similar nature to those recently issued
 “ and directed to any officers of the provincial courts,
 “ or to any of our native subjects not residing in the
 “ island of Bombay.

“ 3. We are quite sensible of the deep responsi-
 “ bility we incur by these measures, but must look
 “ for our justification in the necessity of our situa-
 “ tion. The grounds upon which we act have
 “ exclusive reference to considerations of civil
 “ government and of state policy; but as our reso-
 “ lution cannot be altered until we receive the
 “ commands of those high authorities to which we
 “ are subject, we inform you of them; and we do
 “ most anxiously hope, that the considerations we
 “ have before stated may lead you to limit yourselves
 “ to those protests and appeals against our conduct
 “ in the cases specified, that you may deem it your
 “ duty to make, as any other conduct must, for
 “ reasons already stated, prove deeply injurious to
 “ the public interests, and can, under the resolution
 “ taken and avowed by Government, produce no
 “ result favourable either to the immediate or future
 “ establishment of the extended jurisdiction you
 “ have claimed. A very short period will elapse
 “ before an answer is received to the full and urgent
 “ reference we have made upon this subject; and
 “ we must again express our hope, that even the
 “ obligations under which we are sensible you act,

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“ are not so imperative as to impel you to proceed-
“ ings which the Government has thus explicitly
“ stated its resolution to oppose.

“ We have the honour to be, &c. &c.”

The petition then stated, that on Monday the 6th October instant, the Supreme Court being assembled for the despatch of its judicial business, Sir C. H. Chambers caused this letter to be read to the court by the clerk of the Crown; after which the petitioner concurring with Sir C. H. Chambers in opinion regarding both the form and the substance of the communication, the court directed that the clerk of the Crown should inform the chief secretary to the Government of the Presidency, by letter, that the said letter had been received, and that the Judges could take no notice thereof.

That it was the intention of the said Sir C. H. Chambers and the petitioner to have laid before his Majesty, in an humble petition, the circumstances which were therein above set forth, and most dutifully and submissively to have besought his Majesty's royal protection against what they agreed in considering a most unconstitutional and criminal attempt, on the part of those armed with the whole power, civil and military, of the Presidency, to approach the Supreme Court of Judicature within the same, not by their humble petition, or by motion, by themselves or their counsel, in open court, the only ways in which the law, for the wisest purposes, permitted his Majesty's Judges to be addressed, but by means of such covert and private communication, as was strictly forbidden by the forms reared by the wisdom of ages, for the intrenching their persons against the danger and even the pollution of undue solicitation or menace,

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and this for the declared purpose of inducing the Judges, notwithstanding their most sacred obligations to God, to the King, and to themselves, to refuse to administer justice according to what they should deem to be law, in compliance with such notions as those who had thus approached them might from time to time entertain of what they should call state policy.

That while a petition to the above effect was preparing to be transmitted to England, Sir Charles Harcourt Chambers, then acting as Chief Justice of the said Supreme Court, suddenly died on the 13th of October 1828.

The petition then proceeded at considerable length to explain the motives that influenced the petitioner and his colleague during these proceedings to impugn the conduct of the Governor and Council, and to show the benefit of the Supreme Court having the power to issue the writ of *habeas corpus* in the manner they claimed. It ultimately prayed, That it might therefore please his Majesty to take the premises into his Royal and most gracious consideration, and to give such commands concerning the same as to his Majesty's Royal wisdom should seem meet, for the due vindication and protection of the dignity and lawful authority of his Majesty's Supreme Court of Judicature at Bombay.

The case of Moro Ragonath which is alluded to in the petition may be thus briefly stated: On the 25th of August 1828, a writ of *habeas corpus ad subjiciendum*, directed to Pandoorung Ramchunder for the production of the body of Moro Ragonath,

his ward, was moved for before Mr. Justice Grant, the petitioner, at his chambers, on the affidavit of Dinker Gopall Dew, which stated that Moro Ragonath had been confined for nearly a year, and was still kept in confinement by Pandoorung Ramchunder against his will, and under circumstances attended with great hardship and cruelty. This motion was opposed by the Advocate General, on the ground that Pandoorung Ramchunder and Moro Ragonath were natives, residing at Poonah, and not amenable to the jurisdiction of the Supreme Court. The granting of the writ was postponed for various reasons until the 30th of August, during which time additional affidavits were put in, and in these it was stated that Moro Ragonath having made his escape from Pandoorung Ramchunder on the 12th of July, was retaken and sent back again to his custody by persons acting under the order and by the directions of John Andrew Dunlop, esq., a British-born subject, and a provincial magistrate at Poonah. After considerable discussion, the writ was ordered to issue, and was made returnable to the Court on the 15th of September then next. It was translated by order of the Court into the Marhatta language, and duly served on Pandoorung Ramchunder. A return was made and filed to this writ in these terms :—

“ I, Pandoorung Ramchunder Dumdurré, am the
 “ relation and friend of the Peishwah. I never in
 “ my life have been the servant of the English
 “ Government, or of the English. At the time the
 “ Company’s Government took this country, they
 “ gave me word I should live without fear or moles-
 “ tation. Depending upon that, I remained in

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“ Poonah ; and as for my grandson, Moro Ragonath, I am his grandfather ; he was placed under my care, that I might take care of him according to the usual custom. He, the said boy, is fourteen years old ; for that reason, according to the Shaster of the Hindoos, he is without knowledge : he is bound to behave agreeably to the orders of the person under whose charge he lives ; and further, it is necessary to take care of the property and wealth of the boy : more than this, there is nothing, and there is nothing more done (by me to him,) than by those to whose care a boy is delivered, or the usual orders of seniority in a Hindoo’s family. Should I by any chance do more or less, the same being made known to the Adawlut at Poonah, it would be immediately stopped. After Moro Ragonath’s grandmother died, he was delivered into my charge, according to the rule, and I agreed to undertake that charge, in order that my grandson’s wealth might not be ruined. Without the leave of those by whose authority I took the charge upon my head, I cannot relinquish it. Dated 10th of September 1828, 1st of Bhadrapud Sood Shalabar 1750, the name of the year being Surodharee.”

This return was objected to on two grounds ; 1stly. That there was no return, “ *paratum habeo corpus* :” 2ndly, That no reason was stated to excuse the disobedience, but that the writ ought not to have issued, which was a reason the Court ought not to receive ; and an attachment against Pandoorung Ramchunder was moved for. The Judges took time to deliberate on the question, and on the 29th of September they delivered their judgment, that a

writ of *alias habeas corpus* should issue, returnable on the 10th of October then next.

The case of Bappoo Gunness came before the Supreme Court on an application for a writ of *habeas corpus ad subjiciendum*, to the head gaoler of the gaol at Tannah, directing him to produce the body of Bappoo Gunness, then a prisoner in his custody. The writ was granted on the affidavit of one Babool Ranjee, stating that he had applied to the gaoler for a copy of the warrant under which Bappoo Gunness was confined, and that it had been refused to him. The writ issued on the 10th, and was made returnable on the 19th of September 1828. A return to it was made by the nazir of the court of Adawlut of the northern Concan, and the gaoler to whom the writ was directed in these terms:—"That before the
 " coming in of the writ Bappoo Gunness was taken
 " and detained in our custody by virtue of a certain
 " order in writing of the Adawlut Court of the zillah
 " of the northern Concan, in the Mahratta language,
 " and in the following form:" which was set out, and stated in effect that Bappoo Gunness having been found guilty of embezzlement, was sentenced to two years imprisonment, and a fine of 350 rupees, or in default of payment of that sum to a year's additional imprisonment. The body of the prisoner not having been produced on the 19th, the Judges would not suffer the return to be read, and directed an attachment to issue against the gaoler. On the 26th the attachment was set aside on payment of the costs, at the instance of the Advocate General, and Bappoo Gunness having been brought into Court, the return was read, and held insufficient, because the authority of the Adawlut Court was not stated

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in it; four days time was allowed to amend it, the prisoner being in the mean while committed to the gaol at Bombay. The return was not amended within that time, the Advocate General stating to the court that the reason why it had not been amended, was because Government would not suffer the authority of the provincial courts to be questioned; and Bappoo Gunness was discharged from custody.

Denman, (common serjeant,) and *Alderson*, for the Petitioner :—

It is perfectly clear that the Supreme Court of Judicature possesses the power of issuing a writ of *habeas corpus* directed to all the King's subjects, of whatever description, resident within the territories of Bombay, in order to set free the body of any of the King's subjects detained by them.

The Supreme Court of Bombay derives its several powers from the charter by which it was constituted, in pursuance of the Act of the fourth of the present King. The original necessity of granting those powers to the Courts of Law in our East Indian possessions arose out of the complaints of oppression, and the disputes of persons in authority there, which at different times during the last reign were brought before the Company and Parliament in this country.

One of the resolutions adopted on this important subject at a meeting of the Court of Proprietors, on the 10th of May 1773, was, "that an application
 " should be made for a new charter of justice, to
 " enable the Company to add to each of the Mayors
 " Courts at the three Presidencies, and to the courts
 " of the governors and councils as Courts of Oyer

“ and Terminer, a barrister to act as recorder, to “ extend the powers of the Mayors Courts.” The additional words of the resolutions are most remarkable on the present occasion : “ and particularly to “ introduce the privilege of the *habeas corpus* into “ India.” It is remarkable, too, that in a petition presented to the House of Lords in the same year, the East India Company stated, “ that the most “ effectual provision of all others to prevent oppression which was recommended by the Company, “ viz. that of the *habeas corpus*, whereby men might “ know of what crime they were accused, and by “ whom imprisoned, was omitted.”

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The Supreme Court of Judicature at Calcutta was opened on the 22d of October 1774, from which period, for a long course of years, writs of *habeas corpus* were regularly issued ; most of them apparently to native subjects, and not to those who by way of distinction are called British subjects residing in those territories. On the 16th of January in the year following a motion was made for a *habeas corpus* to the keeper of a place called the prison of the Dewannee Cutcherree, to bring up a person confined there, and the writ was ordered to issue. It should be observed, that by the 13th Geo. III. c. 63, the King's Court had no more jurisdiction in Calcutta over natives or others, except as a court of Oyer and Terminer and Gaol Delivery, than in any other part of the dominions of the Crown of England within the Presidency, and that the zemindary courts of the Company continued to exercise a jurisdiction over natives in Calcutta, just as the zemindary courts do at the present time. Those courts are exclusive, as to the complaints, suits and actions against natives not in the employ

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or service of the Company, or of a British subject, and not brought before the court of Oyer and Terminer and Gaol Delivery. On the 17th of January a return was made to a *habeas corpus* which had been granted to a person of the name of Golum Hider, to produce Sum Ju, a female infant of eleven years of age, stating that the child was voluntarily under his care, and not under restraint. On the 19th of January of the same year a writ was issued to Jona Mullick, keeper of the prison of the Dewannee Adawlut in Calcutta, to bring up the body of Bancharum Roy. That writ was objected to by counsel on Saturday the 21st of January, inasmuch as it issued on the statute of Cha. II., and was not marked *per statutum*. It was answered by the Chief Justice that the writ might be considered as at common law. A motion then was made for quashing the writ, because the common law of England did not extend to India, or at least to no other than British subjects: but this motion was rejected by the court; for on January the 31st a return was made to the writ, and the doctrine was by consequence denied. But when, on the 2d of March in the same year, the return was read again, stating the imprisonment to be in a civil suit for debt, by order of the Court of Dewannee Adawlut, the Supreme Court at Calcutta proceeded to inquire whether that court, which undoubtedly possessed a competent jurisdiction in many cases, possessed it in that which was then under discussion. The plaintiff was a British subject, and the defendant his gomastah or steward, and therefore in the employ of a British subject; both parties were amenable to the jurisdiction of the Supreme Court, and neither of them within that

of the Dewannee Adawlut. The keeper of the prison being in court to make his return, the prisoner was discharged. The Supreme Court thus exercised its authority in determining that the return did not bring the prisoner within the jurisdiction of the inferior court.

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Again, on the 28th of March 1775, a return was made by Jona Mullick, keeper of the gaol of Fousdary Adawlut, to a *habeas corpus* to bring up the body of one Seremani there confined. On the 23d of December in the same year a writ of *habeas corpus*, directed to Warren Hastings, esquire, the governor-general, to bring up the body of Joseph Pavessi, was returned in court, the return being made by the governor-general himself, without the slightest intimation of objection, and the said Pavessi was discharged, the governor-general having declined to state as true, in an amended return, a necessary fact which he had only on report. Pavessi had been taken up in order to be sent out of India contrary to law, he being not a British subject.* It appears, therefore, that at that early period the reform of the Indian governments, and the superintendence of the English law over the settlement, were considered synonymous; and one great object contemplated by the Company itself, was the introduction of the writ of *habeas corpus*, authorizing any man deprived of his personal free-

* This and the preceding cases appear to have been quoted from a pamphlet published in October 1828, at Bombay, and intitled "Proceedings of the Governor and Council at Bombay towards his Majesty's Supreme Court of Judicature." They are there stated to have been extracted from MS. notes made by one of the Judges appointed at the first establishment of the Supreme Court at Calcutta.

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dom to compel the party who imprisoned him to show that he did so by authority of law.

At Calcutta, various instances of the same kind might be cited, and others have occurred at Madras. The importance of the writ of *habeas corpus* has been strongly and justly felt. Whatever Act was passed, and whatever charter was granted, subject to whatever limitation of powers, there was no exception to that writ, and no limitation of its sphere in any of those statutes or charters.

But the writ of *habeas corpus* was expressly given to the Supreme Court of Calcutta by the letters-patent of the 13th Geo. III. ; they conferred upon that court "such jurisdiction and authority as our Justices of the Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit." The writs of *habeas corpus* issued under that power do not appear to have been questioned in any manner which could raise a doubt as to their authority. The erection of the Supreme Court of Bombay has reference to the powers given to the Supreme Court of Calcutta. The 4th Geo. IV. c. 71, indeed gives his Majesty the power by charter or letters patent, "to erect and establish a Supreme Court of Judicature at Bombay, with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and control, in the said town and island of Bombay and the limits thereof, and the territories subordinate thereto, and within the territories which then were

“ or thereafter might be subject to or dependent
 “ upon the Government of Bombay, as the Supreme
 “ Court of Judicature at Fort William in Bengal,
 “ by virtue of any law then in force and unrepealed,
 “ did consist of, was invested with, or subject to,
 “ within the said Fort William, or the places subject
 “ to or dependant upon the government thereof:
 “ Provided always, that the Governor and Council
 “ at Bombay, and the Governor General at Fort
 “ William aforesaid, should enjoy the same ex-
 “ emption, and no other, from the authority of the
 “ Supreme Court of Judicature to be there erected,
 “ as was enjoyed by the said Governor General and
 “ Council at Fort William aforesaid for the time
 “ being, from the jurisdiction of the Supreme Court
 “ of Judicature there.” That is the only proviso
 for the exemption of the Governor and Council of
 Bombay; but the Governor General and Council of
 Fort William are not only exempted from the juris-
 diction of the Court*, but have by the 21st Geo. III.

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* 21st Geo. 3, c. 70, s. 2, “ If any person or persons be
 “ impleaded in any action or process, civil or criminal, in the
 “ said Supreme Court, for any act or acts done by order of the
 “ said Governor General and Council, in writing, he or they
 “ may plead the general issue, and give such order in evidence;
 “ which said order, with proof that the act or acts done have or
 “ has been done according to the purport of the same, shall
 “ amount to a sufficient justification of the said acts, and the
 “ defendant shall be fully justified, acquitted and discharged
 “ from all and every suit, action and process whatsoever, civil
 “ or criminal, in the said Court.”

By section the third of the same Act it is provided, that with
 respect to such order of the Governor General and Council as
 shall extend to any British subject or subjects, the Court shall
 have and retain as full and competent jurisdiction as if the Act
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the power of exempting others also from its jurisdiction by their order in writing ; which approaches very nearly to the letter in question.

In pursuance of this Act of 4th Geo. IV. his Majesty erected the Supreme Court of Judicature at Bombay, by his Letters Patent. By these letters he gave to it various powers and authorities which are exercised by his ordinary writs in the kingdom of England ; and he thought proper to limit the extent of its civil jurisdiction, of its ecclesiastical jurisdiction, and of its jurisdiction as a court of Oyer and Terminer ; but these are the only respects in which he limited, as to the extent of territory, those powers which the court was to possess. The clause limiting the civil jurisdiction is in these words :
 “ And we do further direct, ordain, and appoint,
 “ that the jurisdiction, powers, and authorities of
 “ the said Supreme Court of Judicature at Bombay
 “ shall extend to all such persons as have been heretofore described and distinguished in our charters
 “ of justice for Bombay by the appellation of British
 “ subjects, who shall reside within any of the factories subject to or dependant upon the Government of Bombay.” It thus states, that all the jurisdiction, powers, and authorities of the Supreme Court of Bombay are to extend to those persons : but it cannot mean that the general jurisdiction of the court extends to no others. But if the whole of the article be read thus, “ That the jurisdiction, power, and authority of the Supreme Court of Bombay shall extend to (and that the said court shall be competent and effectual, and shall have full power and authority to hear and determine all suits and actions whatsoever against) any of

“ our said subjects distinguished,” &c.; it would then apply only to the civil jurisdiction alone, as to suits and controversies, and have no reference to any limitation on the other jurisdiction of the court. In like manner the Court of Equity is to extend over all the same persons as those who have civil suits. So again, in speaking of the criminal jurisdiction, the charter authorizes and empowers the said Supreme Court to “ inquire, hear, and determine of all treasons, murders, felonies, misdemeanors, &c. committed by any of the King’s subjects in any of the territories subject to or dependent upon the Government of Bombay.” Now, if all the powers of the court had been previously limited by the clause of the charter granting the civil jurisdiction to subjects residing within the factories, this clause would be inconsistent with it. It therefore shows that limitation not to extend to all its powers and authorities, but its civil jurisdiction alone. The result is then, that first, all the general powers of the Court of King’s Bench throughout a district including Poonah and Tannah, the places in question, are given to the Supreme Court; then a civil authority is given, limited to a smaller district; and then other jurisdictions are given it, limited in the same manner.

The language of this charter thus becomes as intelligible as the principle on which it rests. The native subject shall not have his contract interpreted by a foreign law; but it equally imports him, whether contending with another native, or with a British-born subject, to be secured from that invasion of individual liberty, without which no justice of any kind can be obtained. The distinction is manifest between

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the ordinary objects of civil and criminal justice ; and the high prerogatives vested in the Crown for the immediate protection of all its subjects. The powers which belong to his Majesty by virtue of his royal station, to be exercised by him through his Judges in the Court of King's Bench, exist in conquered countries as well as those to which he succeeded when he came to the Crown. They cannot be taken from him, but by his own concurrence with the two other branches of the Legislature, in words which can leave no doubt of the intention to make so great a sacrifice.

In these letters patent there is also this proviso : " That the Supreme Court shall not be competent to " try any indictment or information against the " Governor General and others who are specified, " except in particular cases." Now the power of granting a criminal information is not involved in that of trying actions and indictments ; yet the proviso clearly implies, that in all cases excluded from it under the circumstances there directed, the Supreme Court might hear a motion for a criminal information.

It was only in the year 1827 that Sir Charles Grey had occasion to give a judgment, which proves the opinion of that learned Chief Justice on the subject. A motion was made for a criminal information against a variety of persons who had obstructed a sheriff's officer in executing the process of the court. Some of the parties complained of were native subjects, not open to the ordinary jurisdiction : no indictment could have been preferred against them. But the others were British subjects, or those employed by British subjects, who clearly would not fall within

the exception. Sir Charles Grey expressly recognizes the distinction which we have drawn. "A question had been made, whether the Court possessed authority to grant a criminal information against Mendy Ally Khan, as it had been said that he was not subject to this jurisdiction, as he was not an inhabitant. In his own opinion, however, (the opinion of the Chief Justice of Bengal) the question of the jurisdiction of the court should not be entertained. There were two distinct powers of jurisdiction vested in the court, that of Oyer and Terminer and of the Court of King's Bench. The former was limited; but the latter was not, but extended throughout all the provinces under this Government. It was his opinion, that the Supreme Court possessed authority to grant information any where in the Company's territories, for any act for which the Court of King's Bench could issue one in England. The court had a complete power of punishing any native, foreigner, or other person soever, for contempt or violent obstruction of the process of the court, in the same way as the Court of King's Bench. It would be perfectly anomalous to say that it did not possess the power of punishing that by the more deliberate mode of information, which could be effected by the more summary process of attachment. He could not confine it to that question, seeing that they possessed the jurisdiction of the Court of King's Bench. He did not know that the Court might not enter into a criminal information against any person whatever: He should state, however, that such an authority should be executed sparingly, and with caution. This would set the question

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“ of the grounds of the criminal information at rest,
“ as their jurisdiction over Mendy Ally Khan did
“ not depend on his being an inhabitant of Cal-
“ cutta.” He then proceeds to say, “ that as some
“ of those persons were not subject to indictment,
“ and those subject to it were the least guilty parties,
“ he would not grant a criminal information, but
“ thought it better to leave it altogether to an in-
“ dictment.”

In this passage the power to try indictments is clearly separated, both from the right to issue attachment for contempt, and from that of granting criminal informations. Indictments can be tried by the Supreme Court only in its character of a court of Oyer and Terminer, and its power to try them is bounded by the terms of the exception; but the power of punishing contempt is inherent in all courts. The power of proceeding by criminal information is inherent in the Court of King's Bench, and is transferred, without limitation as to persons, by the terms of the charter to the Supreme Court.

Numerous cases might be drawn from the books, if authority were wanted, to inform your Lordships that that power does exist in the manner described. In Bourn's case, *Cro. James*, p. 543, “ Montague, Chief Justice, said that the privilege of the Cinque Ports, that the King's writ runs not there, is to be intended between party and party, but no such privilege can be against the King: and this writ (a writ of *habeas corpus*,) is a prerogative writ which concerns the King's justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned; and it is agreeable to all persons and

“ places, and no answer can satisfy it but to return
 “ the cause with *paratum habeo corpus*, &c.; and
 “ this writ hath been awarded out of this court to
 “ Calais, and all other places within the kingdom,
 “ and to dispute it is not to dispute the jurisdiction,
 “ but the power of the King and his court, which
 “ is not to be disputed; and of this opinion were all
 “ the other justices.” This doctrine of Lord Chief
 Justice Montague is fortified by precedents of the
 King’s writ having been awarded to Calais and
 other places within the dominion of the Crown of
 England, and has been fully recognized by the
 Courts in a variety of cases between that time and
 this. Lord Mansfield, in the case of *Cowle*, 2 *Bur-*
row’s Reports, p. 834, laid it down that the King’s
 writ must be said to run in all places throughout his
 dominions, but that this was not the case with all
 writs; and therefore, when he came to lay down the
 rule in that case, his Lordship directed it to be
 entered, that writs of *venire facias* do not run in
 the town of Berwick; but he decided also, that
 the high prerogative writs arising out of a different
 source have a much more extensive operation. Now
 these high prerogative arise out of the natural alle-
 giance the subject owes to the King, and the pro-
 tection which that allegiance requires of the King
 for the subject? This is the principle which is
 stated in *Calvin’s* case in 7th *Reports*, viz. that
 allegiance is the duty of the subject, and that pro-
 tection is the duty of the King. Whenever therefore
 the subject owes allegiance, the King owes protec-
 tion. Now can it be contended that in the case of
 any conquered country annexed to his Majesty’s
 dominions the inhabitants of that country do not

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owe him allegiance? If they do, it must follow that the King must owe them protection, and that protection is to be, as in the present instance, given, by his issuing by virtue of his prerogative his writ of *habeas corpus*, that he may know whether they are lawfully imprisoned or not; or his writ of *certiorari*, that he may know whether any proceedings which have been commenced against them are conformable to the law; or his writ of prohibition, that he may keep the respective courts throughout his dominions in the due exercise of their duties; or his writs of *mandamus*, that he may oblige persons to do such acts as they are bound to perform. Therefore when the King grants to a particular court, by virtue of the authority of an Act of Parliament, these powers arising out of his prerogative, the court has them in their full extent, unless he limits them, either as to extent of territory, or in some other way. Here the King has granted the same powers as the King's Bench exercises in England, to be exercised by the Supreme Court of Bombay throughout a territory including the places to which these writs have been sent. It may be true, that the natives of India are not within the jurisdiction of the Supreme Court for the purpose of suing one another for private matters of dispute; that certain writs known to our law would not run as between party and party, and yet that the prerogative writs of the Crown being restrained by no clause in the charter, nor taken away by the direct words of an Act of Parliament, the sole power sufficient for that purpose must remain in the Crown, and be exercised by that court to which the constitution has assigned so high and inestimable an authority.

In the early part of his able argument in the Court of Bombay, the Advocate General of Bombay referred to the celebrated Patna case, in the year 1777, before Sir Elijah Impey, and from his expressions, endeavoured to infer that the Court had no jurisdiction over the natives in a case like the present.*

“ In this country, the gross body of the people are
 “ not, and only certain persons answering particular
 “ descriptions are, objects of the King’s laws or of
 “ the jurisdiction of this court. As therefore there
 “ are other laws, and other courts, such as they are,
 “ to whom the bulk of the natives are amenable,
 “ and we were not anxious to extend our jurisdiction,
 “ we have suffered these pleas to the jurisdiction to
 “ be pleaded as freely as any other plea,” &c. On
 this doctrine great stress was laid by Mr. Dewar ;
 but Sir Elijah Impey’s authority was not wanted in
 support of the fact, that natives are exempted from
 the jurisdiction of the Supreme Court. The ques-
 tion still comes round, What jurisdiction is here
 contemplated ? Is it that jurisdiction to issue high
 prerogative writs, which cannot be abolished with-
 out positive enactment ; or is it that jurisdiction to
 decide those controversies between party and party,
 which the law designates by the name of suits and
 actions ? Sir Elijah must have referred to the latter
 in the case where he permitted pleas to the jurisdic-
 tion to be freely pleaded.

It was then argued, that because this Act of the
 21st Geo. 3, cap. 70, enacted that “ the Governor
 “ General and Council should cause the name,

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* Patna, Appendix, No. 17, Judgment of Sir E. Impey, in the
 case of Nadarah Begum v. Behader Beg.

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“ description, and place of usual abode of all natives
 “ employed in the service of the East India Com-
 “ pany, in the offices therein mentioned, to be
 “ entered in a book or books to be alphabetically
 “ disposed,” that those precautions would hardly
 have been taken to ascertain what natives should be
 subject to the jurisdiction, if all natives without
 exception were. But, in a limited sense of the
 word, we have no objection to admit that certain
 classes alone are within the jurisdiction. The re-
 gistry of all the persons described is equally desirable
 for this purpose, whether our argument in favour of
 its embracing all in its more liberal sense, be well
 or ill founded.

Having spoken of the high prerogative writs in
 general, we proceed to speak of the writ of *habeas
 corpus* in particular. In the year 1818 the doctrines
 held concerning that writ were examined by Lord
 Eldon, in *Crowley's case*, 2d *Swanston*, p. 1. A per-
 son had been committed by Commissioners of
 Bankrupt for not answering satisfactorily, a motion
 was made for a writ of *habeas corpus* in vacation,
 and the question whether he possessed such a power
 was discussed by him with great care. He found
 a case in point decided by Lord Chancellor Not-
 tingham ; but he resolutely over-ruled that decision
 when he found it inconsistent with the principles
 of the law of England. He treated it there as
 known law, that no man's liberty should be invaded
 without the supreme legal authority having power
 to pronounce immediately on the reason of that
 restraint ; and that this prerogative of the King
 might be called into action at any time, and could
 not be affected by general words in a statute.

The case of Moro Ragonath gave rise to the extraordinary interference of the Governor and Council of Bombay. In that case, although a writ of *habeas corpus* issued, the body was not brought into court, nor any return made to the writ, though a strange, anomalous, questionable document, came from the person to whom it had been sent. The facts stated in that document, if true, might have been returned to the court, and the cause, if sufficient, would have been admitted by the court. It appeared too on the proceedings that the person to whom the writ was directed had obtained the authority of Mr. Dunlop, a justice of the peace of that part of the world, to keep Moro Ragonath in custody, and we apprehend may well be considered as an agent employed by Mr. Dunlop, and thus answering the narrowest description of those within the jurisdiction.

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It is a much less daring presumption than the fiction in the law, that any person brought before the Court of Common Pleas by *habeas corpus* is a privileged person; and therefore Lord Eldon and Mr. Justice Blackstone commend the Common Pleas for presuming the party arrested to have their privilege when they knew he had not, because the law cannot endure that a man under unjust imprisonment shall return to it.

It can hardly ever indeed happen that a person in the Indian territory should be imprisoned without the intervention of English subjects properly so called.

The gaoler, in almost every case, is a native; all the officers of the native courts are natives; but the authority of the native courts is almost always under

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the control of English subjects. Servants of the East India Company preside over their jurisdictions. It would require a great deal of ingenuity, and a most remarkable concurrence of circumstances to find any person imprisoning another, and not acting under the employment of British subjects.

The letter-missive to the Supreme Court assumes to repeal the letters patent granted by the King in respect of all except those residing within the island of Bombay, or such as have been employed by the British authorities : it claims to refuse the execution of writs directed to any officer of the provincial courts ; and in conformity with this assumption of power by the government were its proceedings in the case of Bappoo Gunness.

The Counsel then proceeding to comment on the terms of the letter of the Governor and Council to the Judges,

The *Lord Chancellor* observed, " What we have met here for is to ascertain the jurisdiction of the Supreme Court of Bombay. The object is the discussion of what their power is."

The prerogative of issuing writs of *habeas corpus* is inherent in the Crown, and can only be abolished by express words, and none such are found in the charter. Such writs are issuable by the law of England from the Court of King's Bench, and they run into any dominions under the sway of the English Crown. Such writs have frequently issued from the English supreme courts at the several Indian presidencies, which have all the powers of the English King's Bench vested in them by Act of Parliament. Certain restrictions are imposed on the jurisdiction of the Supreme Court with regard to

the persons subject to it ; but those must be applied, by a reasonable construction, to its ordinary operations as a court of Oyer and Terminer and of Gaol Delivery, not extended to the power of issuing those high prerogative writs which are indispensable for the safety of all the liege subjects of the Crown when urgent necessity demands immediate and decisive interposition. But even if subjects purely native could not be questioned for the imprisonment of a fellow subject, still the agents of those courts which act under British Judges are manifestly excluded from the pretended exemption.

The celebrated statute of *habeas corpus* is intituled, “ An Act for the better securing the liberty of “ the subject, and for prevention of imprisonment “ beyond the seas ; ” and in the *King v. Cowle*, it is stated, that the power of the King’s Bench in England extends to the granting writs of this description directed to persons in the colonies, though the necessity for issuing them had not then occurred. That the court has such a power, appears from the authority of Lord Mansfield, and from the fact that writs of this description have issued into all the dominions of the Crown of England. They may, and do, extend, therefore, beyond the limits of the ordinary civil jurisdiction of the court here ; and so in India the Supreme Court may have this jurisdiction throughout all the conquered territories, though its civil jurisdiction be limited to Bombay alone. The duty of the Court of King’s Bench in England, in such cases, has been most correctly stated by Lord Coke, in his description of the authority of the Court of King’s Bench : “ For the “ pleasure of God and the quietness of our subjects,

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“ to save our conscience and to keep our oath,
 “ by the assent of our great men and other of our
 “ Council, we have commanded our Justices that
 “ they shall from henceforth do even law and exe-
 “ cution of right to all our subjects, rich and poor,
 “ without having regard to any person, without
 “ letting to do right for any letters or command-
 “ ment which may come to them from us, or from
 “ any other, or by any other cause.” If the Court
 of King’s Bench in England would not have neg-
 lected to do right for any letters the King of Eng-
 land might send to them, it is too much to expect
 that the Judges of the Supreme Court of Bombay
 should, without remonstrating, receive from the
 Governor and Council of that Settlement a letter or
 commandment interfering with the upright and con-
 scientious discharge of their judicial functions.

Bosanquet and *Spankie* (Serjeants) for the East
 India Company :—

It is obvious, from the words of the Act of the 4th
 of his present Majesty, that the intention was not
 to give any jurisdiction to the Supreme Court at
 Bombay within the territories subject to Bombay,
 beyond that exercised by the Supreme Court within
 the Presidency of Fort William. In one respect, it
 will be found that the jurisdiction given by the
 charter carrying into effect the object of that Act
 is less.

But, for the present, let us suppose that the
 authority conferred is to the full extent the same as
 that conferred on the Supreme Court of Fort Wil-
 liam. The great principle of the jurisdiction of the
 new courts which were established in India by the

13th of Geo. III. was this, that so far as locality was concerned in the town of Calcutta, there was conferred an unqualified territorial jurisdiction over all the inhabitants. There is another jurisdiction, not so extensive in its effects, though reaching throughout the dominions subject to the Presidency, applicable to the designated classes of persons. The two things are most perfectly distinct; and we admit, that so far as the privileges and authorities of the Court of King's Bench in England can be applied, either to the localities of Calcutta or Bombay, or to the designated classes, the jurisdictions may be conceded; but it does not follow that they should have in the territory at large a jurisdiction, either to attach upon individuals not of the designated class, or to control the proceedings of other courts of a distinct authority. The distinction appears to have been wisely and considerably adopted by the Legislature. At Fort William, at Madras, and Bombay, the English law had prevailed for at least a century. It had prevailed, at all events, from the charter of Geo. I. It was known as the existing law there antecedently to the year 1774: persons had been tried and condemned under the local jurisdiction of Calcutta for forgery and other crimes created by English statutes. Those who came to those towns, which were a kind of English colonies, came to the English law: they came to a place where they could no more evade the jurisdiction than men who come to England have a right to be tried by the law they leave behind them. The other class was a class who became subject, by their own acts, the servants of the Company, or British subjects, &c. &c.; who by

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voluntarily entering into those services rendered themselves subject to the jurisdiction of the King's courts. It was the policy of the law to leave those persons out of the local limits and of the designated classes, in point of jurisdiction, to be governed by their own law ; and the exception was an exception to which they subjected themselves ; and this is the view taken of the subject in the speech of Sir Elijah Impey in the House of Commons.

The power enjoyed by the native or provincial courts, is a power possessed by them long antecedent to the British conquests in India, and which exists, except where it has been altered by the legislative authority, which the British Parliament does not directly exercise, but which it has confided to the Governor General in Council. Thus all persons not subject to the King's courts are living under their own laws, under the authority of the British Legislature, and may be considered, to many purposes, as a separate nation under a different government. What is the power of the Court of King's Bench supposed to be ? The King himself formerly exercising his sovereign authority in the *aula regis*, which he now exercises by that court, still called the Court of our Lord the King before the King himself. The whole administration is derived from the ancient *aula regis*, the centre of all judicial authority ; and all the King's courts are subject, without exception or distinction, to the control of the Court of King's Bench. But the laws of England are not the laws of India. There is a code of laws which the King has thought fit, by the consent of his Parliament, to continue or enact, and which are not the King's laws in the sense that the laws of

England are. There is therefore no analogy between the circumstances. The Courts in England are all drawn from the same source, they all flow in the same channel, they all apply to the same persons. But the laws in India are derived from a different source; they attach upon different classes of men; they have nothing in common with the laws of England. To confer upon the English courts of law existing locally in Calcutta or Bombay a control over the native laws and courts, would be a species of anomalous judicial administration, which we trust will never be sanctioned by the British Legislature.

Previous to the establishment of the Supreme Court in the year 1773, there were Mayors Courts at Calcutta, Madras, and Bombay. The statute of 13th Geo. III. authorized the institution of a Supreme Court only at Calcutta. The language of that Act, and the charter founded upon it, gave rise to various discussions. Certain circumstances, which have been treated as precedents on the other side, took place previous to the 21st Geo. III.; but according to the best information which we have received, no instance is to be found since the passing of the 21st Geo. III. in 1781, in which an attempt has been made by the Court at any one of the three Presidencies, to issue a writ of *habeas corpus* of the description now contended for.

The statute of the 13th of Geo. III. in the year 1773 provides that his Majesty shall have power to erect a Supreme Court at Fort William, and a proviso to this effect is added: "That the said new charter, and
" the jurisdiction, powers and authorities to be there-
" by established, shall and may extend to all British
" subjects who shall reside in the kingdoms or pro-

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“vinces of Bengal, Bahar, and Orissa, or any of
 “them, under the protection of the said United Com-
 “pany; and the same charter shall be competent
 “and effectual, and the Supreme Court of Judicature
 “therein and thereby to be established shall have
 “full power and authority to hear and determine all
 “complaints against any of his Majesty’s subjects,
 “for any crimes, misdemeanors, or oppressions com-
 “mitted, or to be committed, and also to entertain,
 “hear and determine any suits or actions what-
 “soever against any of his Majesty’s subjects in
 “Bengal, Bahar, and Orissa, and any suit, action
 “or complaint against any person who shall, at the
 “time when such debt, or cause of action, or com-
 “plaint shall have arisen, have been employed by
 “or shall then have been directly or indirectly in
 “the service of, the said United Company, or of
 “any of his Majesty’s subjects.”

Whatever obscurity or ambiguity may be found in particular clauses or expressions of this charter, or of the Act of Parliament, we apprehend that the court which was established was not a court of general jurisdiction throughout all the provinces, in the nature of the Court of King’s Bench, with certain exceptions, but a court of local and limited jurisdiction, with an extended jurisdiction, in certain cases, over certain descriptions of persons. This undoubtedly is a most material distinction in principle. It has been universally understood, that these are courts of limited and local jurisdiction, having a general jurisdiction within those local limits, not only over British subjects, but over all the native subjects, Mahommedans and Hindoos as well as Christians, in all matters criminal and civil; subject to a proviso

that the persons of different religions should be judged according to their respective religions, in certain cases; and that beyond these limits the courts shall have a certain jurisdiction over certain persons described to be British subjects, and persons in the service either of the East India Company or of other British subjects.

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The next material proviso is, "That the Supreme Court shall hear and determine any suits or actions of any of his Majesty's subjects against any inhabitant of India, residing in Bengal, Bahar, Orissa, or any of them, upon any contract or agreement in writing, where the cause of action shall exceed the sum of 500 current rupees, and where the said inhabitant shall have agreed in the said contract that in case of dispute the matter shall be heard and determined in the said Supreme Court." This is certainly a very extraordinary provision to be introduced into an Act which is supposed to establish a court of general jurisdiction.

sect. 16.

* The Act of 13th Geo. III., and the charter founded upon it, gave rise to various disputes, arising, among other things, out of the issuing of the writ of *habeas corpus*; in consequence of which the Act of 21 Geo. III. cap. 70, was passed for the purpose of removing doubts with respect to persons subject to the jurisdiction of the Supreme Court. The writ of *habeas corpus* had been issued to persons who were owners of land: and it was contended that any person who held the land, and who paid rent, but had no other occupation connecting him with the

* For a short and entertaining, although perhaps not a very impartial, account of these disputes see Mill's History of British India, book 5th, chapter 6th.

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East India Company, was to be considered as a person within the service of the East India Company, and as such within the general jurisdiction of the court. It has been said that applications were made on the part of the East India Company that provision should be made in the Act, giving power to issue the writ of *habeas corpus*. To what particular descriptions of persons the direction of such writs was intended to be confined is not stated; but if the subject was brought under the consideration of Government, and yet no clause was introduced in the Act of 21st Geo. III., then we have the less reason to suppose it was the particular intention of the Legislature to give the authority contended for. Certainly it is not expressly given, but the persons to whom writs of *habeas corpus* are said to have been addressed are expressly excepted from the jurisdiction of the court in the 9th and 10th sections of that Act, which says, generally, that natives under the circumstances therein particularized shall not be subject to the jurisdiction of the court on account of those circumstances; thereby clearly assuming, that but for those circumstances as natives, they would not be subject to the jurisdiction of the court. And then a clause is added, "that for more perfectly ascertaining those natives who should be subject to the jurisdiction of the Supreme Court, the Governor General and Council should cause the name, description, and place of usual abode, of all natives employed in the service of the East India Company, with certain exceptions, to be entered in a book or books alphabetically disposed.

How, then, was this matter understood soon after the passing of the 21st Geo. III.? Out of the trans-

actions which took place between the year 1773 and the year 1781, various accusations arose against the individuals occupying certain high stations, and among others, there was a charge against the Chief Justice of the Supreme Court, Sir Elijah Impey, who made his defence in the House of Commons, in a speech which was afterwards printed in the shape of a separate publication, and is correctly copied in the 26th volume of the Parliamentary History. "The charter," says Sir Elijah Impey, at page 1358 of that work, "has given a criminal jurisdiction, not local and territorial, over the provinces, but personal, over part of the inhabitants, answering to certain descriptions; but the jurisdiction given over the inhabitants of Calcutta is universal, that being a territorial jurisdiction throughout the whole town of Calcutta." The object of the learned Judge upon this occasion was different from that which is now the subject of consideration; for it became important for him to show that the jurisdiction in Calcutta was a general jurisdiction, and that the jurisdiction in the provinces was not a general jurisdiction. "The first, as to the provinces at large, is new, and was introduced by that charter. All the laws of England established by that charter I admit to be new, as to them, and only to be supported by the authority of that charter; but with regard to the town of Calcutta, the operation of the statute was different. Long before the erection of the Supreme Court in 1774, there had existed in Calcutta courts in the nature of Oyer and Terminer and Gaol Delivery, administering the criminal laws of England with a territorial jurisdiction over Calcutta. The 13th Geo. III. abolished these

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" courts to make room for the Supreme Court. It
 " gave to the Supreme Court the power of trying
 " the same crimes, with a territorial jurisdiction
 " co-extensive with that of the old court."

It has been intimated that the jurisdiction now
 contended for has been enforced at Madras. Such
 a jurisdiction is at variance with the doctrine stated
 by Sir Thomas Strange, Chief Justice of Madras in
 the year 1802, in the first volume of his Reports,
 page 135, *Nagapah Chitty v. Rachumnah* and
 another. He there says, " It has been truly ob-
 " served, that it is impossible to argue in this court
 " from any analogous cases of jurisdiction in the
 " courts at home. Those courts being by their con-
 " stitution, according to their respective modes and
 " purposes of proceeding, the great depositaries of
 " the universal justice of the realm, and as such, in
 " every instance in which it is attempted to with-
 " draw a case from their cognizance, bound to see,
 " distinctly and unequivocally, that a jurisdiction
 " adequate to the object in view exists elsewhere.
 " If that be not stated so as to appear to the court,
 " a plea to the jurisdiction fails, and the jurisdiction
 " remains. But it is different here, because, though
 " co-ordinate in its nature with those courts so far
 " as its jurisdiction attaches, the jurisdiction of this
 " court is limited with regard to persons not being
 " British subjects." This passage, we apprehend,
 bears on the very subject under consideration here.
 Though there are words in this charter giving to the
 court the authority of the Court of King's Bench,
 it is the nature of the authority which is described,
 and not the extent of the jurisdiction. The extent
 of the jurisdiction is limited by other clauses; but

the nature of the authority which the Judges are entitled to exercise where they have jurisdiction, whether within the local limits in respect of the inhabitants generally, or beyond the local limits in respect of British subjects, for English purposes, and administering English law, is in the nature of the authority exercised by the Court of King's Bench in England. "Generally speaking," adds Sir Thomas Strange, "it is restricted with regard to the natives (whether wisely or not is not for us to consider) to the inhabitants of Madras, and the plea therefore very properly confines itself to these facts; upon which the court is fairly called upon to say, whether the defendants, being natives, can be considered as inhabitants of Madras for the purpose of being subject to our jurisdiction upon the present bill. It is said in many cases, *boni judicis est ampliare jurisdictionem*. If for *jurisdictionem* be read (as was always read by Lord Mansfield) *justitiam*, it is a noble maxim. If an object and matter of jurisdiction exists, it is indeed the part of a Judge, so far as circumstances may admit, to administer an enlarged and amplified justice, embracing the interests of all parties and all the bearings of the case in any other sense of the maxim. It seems to me that the strength of every jurisdiction consists mainly in a temperate admeasurement of it by those in whom it is vested; and that so far from its being the duty *boni judicis ampliare*, it becomes none more than Judges to set to others in power a different example, instead of, by overstrained constructions, and upon fanciful imaginations, to be outstepping the bounds set by their commission. Neither are we to presume

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“ that justice will not be done, though this court,
“ sustaining the plea, should decline the office of
“ rendering it.”

There are various passages to be found in different statutes which strongly show, not, perhaps, the entire exemption of the natives of India from the jurisdiction of the Supreme Court, but that the authority of the Supreme Court was never intended to embrace them; and that they were never comprehended within that extensive authority which is given to the Supreme Court with respect to British subjects.

Your Lordships will find in the 53d of Geo. III., cap. 155, a long list of offences created in various clauses, all of which are introduced by words importing in clear terms the distinction between the local and personal jurisdiction of the court. At section 114, after reciting that it “ was expedient “ that the stealing securities for the payment of “ money within the East Indies should be made “ felony,” and so on, it enacts, that if any person or persons within the “ local limits of the criminal “ jurisdiction of any of his Majesty’s courts at Fort “ William, Fort Saint George, Bombay, or Prince “ of Wales’s Island, or if any person or persons, personally subject to the jurisdiction of any of the said “ courts at any place in the East Indies :” so that the distinction between the local jurisdiction of the court, and the personal jurisdiction of the court, is very distinctly recognized, and that there may be persons within the local limits of the jurisdiction who are not personally subject, acknowledging a distinction between the local and the personal jurisdiction.

A question then arises whether a native who is

an officer of a provincial court, a gaoler, for instance, and who as such may be considered as a person in the service of the East India Company, is subject to have an *habeas corpus* directed to him in his character of gaoler, for the purpose of bringing up a native prisoner in his custody before the Supreme Court at Bombay. If we are right in supposing that there never has been any intention of giving to the Supreme Court a control over the proceedings of the Provincial Courts, if a regular succession of appeals has been established from the Provincial Courts up to the highest appellate tribunal, and in cases of sufficient magnitude to justify it to your Lordships at this Board, passing by the Supreme Court, and proceeding in a course of judicature entirely distinct from that of the Supreme Court, it is a most important question whether the course of proceeding is to be entirely evaded, on a ground very similar to that acted upon between 1773 and 1781. At that time certain natives, because they held land, or because they were employed in certain transactions, were contended to be within the language of the Act of Parliament and charter, which subjected persons in the service of the East India Company to the jurisdiction of the Supreme Court. Let it be admitted for the argument that the gaoler of a Provincial Court stands in the character of a person in the service of the Company, and that he would be liable, as such, to have an *habeas corpus* directed to him, if he, as an individual, detained any person in his custody. Does it therefore follow that his character as a servant of the Company would give a right to the court to direct an *habeas corpus* to that person, to bring up a person in his custody as a prisoner of

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the local court? Does it give a right to the Supreme Court to examine into the constitution of the court (for this has been asserted), and to review its proceedings? It has been said the court must have before it all the regulations and laws by which the Provincial Court was constituted, whether such court be a part of the original establishment of the Mogul Government not yet altered, or whether it be a new court established under the authority given by Parliament to the Government to make regulations. All this, according to the doctrine contended for, must be brought before the court in the shape of a return, for the Supreme Court to judge, first, whether the Provincial Court has been legally constituted, and in the next place, whether, if it has been legally constituted, its proceedings have been properly conducted. We humbly apprehend, that it is manifest from the whole tenor of the Acts of Parliament and charter, that no such jurisdiction was intended to be given. In the Regulating Act of 21st George III., section 23, it is enacted "that the Governor General and Council shall have power and authority from time to time to frame regulations for the Provincial Courts and Councils." Here is a distinct legislative recognition of these Provincial Courts. A similar power is given to the Governments of Madras and Bombay to regulate the proceedings of the Provincial Courts of their Presidencies, and all those regulations are subject to the revision of his Majesty in Council. They are all directed to be transmitted to the Secretary of State, and if not altered, they become the law of the provinces by which those courts are governed. It is quite clear, therefore, that the Legislature has distinctly recognized

the existence of those courts, the manner in which they are to be regulated, and the law by which they are to be governed. The regulations for the government of the provinces require no registration in the Supreme Court; while those which bind the inhabitants of Calcutta, Madras, and Bombay, and all British subjects, must be registered in and approved by these courts.

Then we come to this section, (sec. 24); "That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country courts, for any judgment, decree, or order of the said court, nor against any person for any act done by or in virtue of the order of the said court." So that although a native should be in the service of the East India Company as an officer of a provincial court, and although a British subject should be a Judge of such a court, for acts done in such court, no action lies against him. The same language is to be found in the charters; but although no action is allowed to try whether the act was legal or not in the Supreme Court, yet it is contended that the legality of the proceedings may be examined through the medium of an *habeas corpus*. This appears an extraordinary argument; and seeing that there is no provision to that effect in any of the Acts, we venture to submit that there is no ground for issuing the writ.

We will now consider the charter recently granted to Bombay. This charter contains a clause on which the whole question turns, and but for which there would be no ground of argument. The clause runs thus: "That the said Chief Justice and the

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“ said puisne Justices shall, severally and respectively, be, and they are, all and every of them,
 “ hereby appointed to be Justices and conservators
 “ of the peace, and coroners, within and throughout
 “ the settlement of Bombay, and the town and
 “ island of Bombay, and the limits thereof and the
 “ factories subordinate thereto, and all the territories
 “ which now are, or hereafter may be, subject to
 “ or dependent upon the Government of Bombay
 “ aforesaid, and to have such *jurisdiction and authority*
 “ as our Justices of our Court of King’s Bench
 “ have and may lawfully exercise within that part
 “ of Great Britain called England, as far as circumstances will admit.” Now, is it possible to construe this section otherwise than as saying that they are to be Justices and conservators of the peace throughout the Presidency of Bombay, and to have such jurisdiction and authority *secundum subjectam materiam*? that is, as such Justices and conservators of the peace as the Justices of the King’s Bench, who we know are Justices of the peace, have and may exercise in that character throughout the whole realm of England, as far as circumstances will admit. Unquestionably, the Judges of the Supreme Court are so with respect to all British subjects throughout the provinces; and as such, the jurisdiction they have is of the nature of the jurisdiction which is possessed by the Judges of the King’s Bench when acting as Justices and conservators of the peace.

It is insisted, however, that by this clause all the powers of the Court of King’s Bench in England are granted to the Supreme Court at Bombay, not merely throughout the settlement of Bombay, but

throughout the territories subject to the Presidency of Bombay, unlimited in any manner whatever with respect to persons; and that the Court of King's Bench has authority to issue such a writ to any part of the provinces subject to the different Presidencies of India; a position into which it is not necessary to enter at large, but which, we apprehend, is founded upon an expression in one of Lord Mansfield's judgments, in which he mentions "the plantations." In that very judgment, however, his Lordship says he does not recollect or know of any instance of a writ of *habeas corpus* having been issued to such dominions. Applications, he says, had been made to this Board upon the subject, and we all know that this Board has a general superintendence in matter of law over the colonies. If, therefore, an affidavit should be laid, before the court, in which some individual was bold enough to swear to circumstances giving a *prima facie* jurisdiction to it, according to the doctrine contended for, an individual imprisoned at the foot of the Himmalayah Mountains must be brought from thence to the Court of King's Bench at Westminster, provided that the Court of King's Bench should think fit to issue a writ. It is said that the court possessed this power, and it was exercised when Calais was in the possession of this country. Of that there is no doubt. Calais sent members to Parliament, and at one period the law of England prevailed there. It is not necessary, however, to enter into this question.

We understand that a learned dissertation was made in the courts below, founded on the doctrines of Lord Hale, in which a distinction is made between the *jura summi imperii* and the *jura mixti imperii* or *potestas*

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Cowle's Case,
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*jurisdictionis**; and it was contended that though the Supreme Court has no jurisdiction in the ordinary sense of that word, that is no civil jurisdiction over natives; that it has not criminal jurisdiction; that it has not equitable jurisdiction, that it has not ecclesiastical jurisdiction; that it has not Admiralty jurisdiction, yet that it has a *potestas* to be exercised over all the subjects of the King†. Now it is remarkable, that in almost every part of this charter but that now under consideration, the words “power, jurisdiction, and authority” are to be found; but in this particular clause the word “power” is not found. It is very singular, that where so much is built upon the term power, as distinct from jurisdiction, the word expressing power should not be to be found. But what is jurisdiction as distinguished from power? and what jurisdiction is this which is meant to be exercised? In the Pandects, lib. ii. tit. 1, the nature of jurisdiction is fully discussed,

* Hale's Analysis of the Civil Part of the Law of England, section 6th.

† Sir Peter Grant, in his judgment in the court below, after mentioning the distinction drawn by Lord Hale between the *jura summi imperii* and *jura mixti imperii*, proceeded to state Lord Coke's description of the Court of King's Bench, 4th Instit. cap. 7; and observed, “The third description of power possessed by this court has reference to the supreme ministerial authority which is lodged in it, altogether separate and distinct from its judicial jurisdiction, or the power it exercises in the trying of causes, whether in the first instance, or by way of appeal: being a sovereign *potestas imperii*, expressly described by Lord Coke as a power to correct errors and misdemeanors judicial; not by the way of trying, hearing, and determining, as in pleas of the Crown, but by issuing the prerogative and mandatory writs of the Crown; as of *habeas corpus*, *prohibition*, *mandamus*, and by bailing any person for any offence whatsoever.”

and one of the commentators gives a definition of it in a single line, "*Jurisdictio ea est notio quæ jure magistratûs competit* *."

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It is said that the Supreme Courts are Courts of King's Bench, with all the authority of the King's Bench. In Wales the jurisdiction to the Court of Great Sessions is given by the 34th and 35th of Henry VIII. c. 28, nearly in the same words. They have been introduced too into the charters of the Courts of almost all his Majesty's colonies, and are, indeed, a general formula, of which the most extensive import must be qualified by the specific provision by which it is accompanied.

It is worth while to observe also, that a clause Sec. 4. of a similar description is to be found in the charter given to the Supreme Court at Fort William; and that clause is taken from a clause in the charter of the 26th George II. page 446, of the charters of the Company, and which ordains, directs, establishes and appoints, that "the Governor or President and Council of Fort William in Bengal for the time being, shall be Justices of the peace, and have power to act as Justices of the peace, and as Commissioners of Oyer and Terminer and general Gaol Delivery; and that they, or any three or more of them (whereof the Governor or President, or in his absence the senior of the Council then residing at Fort William aforesaid, to be one) shall and may hold sessions of the peace, and of Oyer and

* Cujacii paratitla in Pandecta, lib. 2, tit. 1: Jurisdictionis proprie notio est quæ jure magistratûs competit, quæ enim mandata a magistratu, aut a lege specialiter magistratui delegata est, non jure suo competit; officio quidem magistratûs continetur sed jurisdictione non continetur.

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“ Terminer and Gaol Delivery respectively, in and
 “ for the said town or factory of Calcutta, at Fort
 “ William in Bengal, and other the factories sub-
 “ ordinate thereto, and do all such other acts as
 “ Justices of the peace and Commissioners of Oyer
 “ and Terminer and Gaol Delivery, with such pow-
 “ ers, jurisdictions, and authorities, and under such
 “ regulations and restrictions, as are hereinbefore
 “ given, granted, limited, and appointed, concerning
 “ Justices of the peace and Commissioners of Oyer
 “ and Terminer and Gaol Delivery for the said town
 “ of Madraspatnam.” The clause respecting Madras
 is found at page 430, and is in these words: “ We
 “ do give and grant unto the said Company and
 “ their successors, and do by these presents will,
 “ ordain, establish, and appoint, that the Governor
 “ or President and Council of Fort Saint George
 “ aforesaid for the time being, shall be Justices of
 “ the peace, and have power to act as Justices of
 “ the peace in and for the said town of Madras-
 “ patnam, and in and for Fort Saint George, Fort
 “ Saint David, Vizapatam, the factories on the
 “ coast of Sumatra, and all other the factories
 “ subordinate to Fort Saint George aforesaid, in
 “ the same or the like manner, and with the same
 “ or the like power, as Justices of the peace consti-
 “ tuted by any commission or letters patent under
 “ our great seal of Great Britain, for any county,
 “ city, or town-corporate in that part of our said
 “ kingdom called England, do or may exercise such
 “ office.” It was right, when a Supreme Court was
 constituted, that the Judges of that court should
 also be declared to be Justices and conservators of
 the peace throughout the whole extent in which they

had occasion to act at all, either in their ordinary jurisdiction, or their more extended jurisdiction ; and it was then natural, that instead of giving to the Judges a jurisdiction assimilated to that of Justices of the peace by their commission, they should have a power as conservators and Justices of the peace, of the nature possessed by the Judges of the Court of King's Bench, and such appears to be the manifest intention of this section.

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It has been, too, contended on the other side, that the Supreme Court has the power of issuing all the mandatory writs of the Crown to all the courts, of whatever description, within the territories subject to the Presidency of Bombay. If that power existed under the former general clause, why does the charter proceed, after establishing Courts of Request and Quarter Sessions, “ to grant and ordain that all “ the said Courts, and Justices and other Magistrates “ appointed for the town and island of Bombay, “ and the factories subordinate thereto, shall be “ subject to the order and control of the Supreme “ Court of Judicature, in such sort, manner and “ form, as the inferior courts and magistrates of “ England are by law subject to the order and control of our Court of King's Bench ; to which end “ the said Supreme Court is empowered and authorized to award and issue a writ or writs of “ *mandamus, certiorari, procedendo*, or error.” Where was the use of this clause, giving the court this jurisdiction with respect to certain courts to be erected within the local limits of Bombay, if it had a general jurisdiction over every court established within the limits of the territories subject to the Presidency. The Court indeed had a further juris-

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diction in its character of a Court of Oyer and Terminer.

In the statute of 33 Geo. III., chap. 52, which was the Charter Act preceding the last, a power is given to the Governor General of Bengal to issue commissions of the peace in his Majesty's name, and to appoint Justices of the peace for the Province and Presidency, island, town and factory of Bombay, and the places belonging or subordinate thereto: and a clause is added, (sec. 153) declaring " that
" all convictions, judgments, orders, and other proceedings, which shall be had, made, or pronounced
" by or before any Justice or Justices of the peace
" within any of the British settlements or territories
" in India, out of the court of Oyer and Terminer
" within and for the same, shall and may be removed by writ of *certiorari* into the court of Oyer
" and Terminer and Gaol Delivery, of and from the
" same Presidency, at the instance of any of the
" parties thereby affected or aggrieved."

A similar provision is also made with respect to convictions before the zillah magistrates, by the 53d of the late King, in cap. 155, sec. 105, by which a power of removing them by *certiorari* is given in the court of Oyer and Terminer of the Presidency. Now it is a maxim, that where the power of issuing the writ of *certiorari* is not expressly taken away, it exists by common law in the Court of King's Bench; and to oust their jurisdiction it must be taken away expressly. But here it is not the question of taking it away; but the question is of giving it expressly, and whether it would have existed at all unless so given. The Judges of the Court of Oyer and Terminer at Bombay are the Judges of the Supreme Court: but

they do not take this superintending authority over the Zillah Courts *quà* Supreme Court; but a special authority is given to them for that purpose to issue a *certiorari* out of the Court of Oyer and Terminer. This tends strongly to show that the Supreme Court, as such, does not possess the power which is contended for.

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Lord Tenterden:—

“ The conviction of the Justices of the peace may
“ be removed by *certiorari* into the Supreme Court
“ of the Presidency.”

Into the Court of Oyer and Terminer, that court being constituted of the same persons. But the authority is not given to them as Judges of the Supreme Court, but as Justices of Oyer and Terminer.

The charter of Bombay does not suppose it confers an universal criminal jurisdiction, for it constitutes a court of Oyer and Terminer and Gaol Delivery, to enable the court to exercise criminal jurisdiction. The power of civil jurisdiction is given specifically :—The persons to be subject to the jurisdiction are specifically pointed out. A general jurisdiction over the Provinces can never be supposed to be given unqualified, and with all the privileges and prerogatives of the Court of King’s Bench. The Supreme Court is a civil court and a court of equity; and according to the rules of construction applied on the other side you give all, and then you give a portion : you give all the jurisdiction; you give as it were the whole estate, and then you dole out in detail these little beneficial legacies. Those who have already obtained the whole, are to have, under this rule of construction, something less than the whole.

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With respect to Moro Ragonath, however, it is impossible to contend that such a power could have been given to the Supreme Court of Bombay as was attempted to be exercised in his case. He was residing at Poonah. It was wanted to remove a cause into the court of Bombay. A *habeas corpus* was granted on an affidavit, and a person of high rank, nearly related to the deposed family, was called upon to bring up the body of a boy of whom he was the natural guardian, but who it was stated was then unduly detained in his custody. The question rises immediately, how was he subject to this jurisdiction? If he had resisted, and a scuffle ensued, how could an attachment have been issued against those who disobeyed the writ. By this power of issuing an attachment you give a local jurisdiction, which by the regular prescribed terms of the charter does not exist. If the party disobeying is of the designated class subject to the jurisdiction of the Supreme Court, he ought to be registered: this man was not registered, and therefore there seems to have been no jurisdiction at all in the Court to have issued the writ; and he never could have been guilty of contempt in disobeying it. Even the Roman Emperor tells his subjects they are not bound to obey where the Judge exceeds the limits of his territorial jurisdiction: Pand. lib. 2. tit. 1. sec. 20. "*Extra territorium jussucenti impune non paretur.*"

With respect to the case of Bappoo Gunness, a writ of *habeas corpus* was directed to the gaoler of the Provincial Court. If such jurisdiction in issuing the writ is allowed, every person acting under the authority of the Court on receiving such a writ, must bring up the body to the Presidency, or state

in detail the reasons of the detention, by whom made, and so on. How could such officers state the circumstances with such precision as to obviate objection? A return to a *habeas corpus* drawn at Delhi or Poonah would be found extremely deficient according to our forms. Those who framed these laws could never have overlooked that consideration, and it is clear they never intended to let in such a state of things at all.

It may be important to call your Lordships attention to this circumstance, that provision is made in various Acts for the establishment and regulation of the Provincial Courts with a course of appeal. By the 37th Geo. III. cap. 142, sec. 8, the regulations of the Governor General affecting the natives are to be formed into a code, and published in all the native languages, that the natives may know what is the law to which they have to look. This was a measure first adopted by the late Marquis Cornwallis, and found to be so highly beneficial that it was adopted by the Legislature, and made part of the law of the country.

There is a regular establishment of Provincial Courts, with a succession of appeals from the lowest court to a court of the highest appellate jurisdiction, both in criminal and in civil matters, established at the several Presidencies. The Court of Suddur Dewanny Adawlut is the highest court of appeal in India in civil, as the Court of Suddur Nizamut Adawlut is the highest court of appeal in criminal cases. Both these courts are recognized by the 53d Geo. III. A provision is also made for an appeal to his Majesty in Council, in cases above the value of 5,000 *l.* from the Court of Appeal in India, passing

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by the Supreme Court. At Bombay, the numerous regulations concerning the Courts of Justice have with great labour and care been lately reviewed, and formed into a code. This code was published in 1827, and clearly shows that as much pains have been taken for the protection of the subject, to enable him to obtain redress from any injury which he may sustain from Provincial Courts or Magistrates in the territories of Bombay, as in any part of his Majesty's dominions. With respect to the improper detention of persons, there are particular regulations, all which the Magistrates are bound by their oaths to carry into execution ; and if they act corruptly they are subject to be proceeded against in the Supreme Court, for which there is a special provision by statute. In Regulation XII, the manner in which the senior Magistrate is to superintend all subordinate officers is pointed out, and by Regulation XIII, the Judge is bound to visit all the gaols, for the purpose of ascertaining whether persons are unlawfully detained there ; he is to visit both the criminal and civil gaols, to notice to the officer concerned erroneous judgments, and to forward cases, if necessary, to the Suddur Foujdaree Adawlut for revised decision.

It is not intended to say that a man who is in the service of the Company as an officer of a Provincial Court is therefore exempted from the jurisdiction of the Supreme Courts in matters where he acts as an individual : but it is declared, that if he detains any person by the orders of the Provincial Court he is subject to no action for such an act, nor is the Judge subject to an action. The only proceeding against him in the Supreme Court is by information, in case

of corruption. When a person is detained under the orders of the courts in the Provinces the Supreme Court cannot order such person to be brought up for the purpose of investigating his case. That court has no such superintending jurisdiction over the courts in the Provinces as that which Lord Coke in his fourth Institute states the Court of King's Bench to possess, by virtue of which it superintends and restrains the excesses of all the inferior jurisdictions of the country. Such an authority has not been given to the Supreme Court, and consequently the issuing of the writ of *habeas corpus* in the cases mentioned in the petition were illegal acts.

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Mr. *Denman*, in reply :—

The Supreme Court at Bombay is made a Court of Oyer and Terminer, it has also the jurisdiction of the Court of King's Bench in England, and it is as incident to that court that the present power is claimed.

It has express power over the Court of Requests and the Court of Quarter Sessions, “ to issue writs “ of *mandamus*, *certiorari*, *procedendo*, or error, and “ to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment.” Now the question is asked, why the charter should give these particulars if they were already included in the general grant. Is this, then, the first time that in all the rolls of English Acts of Parliament an unnecessary power can be shown to have been created, or express terms to have been used, where they were superseded by clear implication, or that the figure of speech called tautology can be detected.

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Unless the argument is pushed to that extent it is plainly worth nothing ; and that it cannot be fairly pushed to that extent the experience of every session demonstrates.

But if this clause proves any thing it proves a great deal too much. The only writs enumerated in it are those of *mandamus*, *certiorari*, *procedendo*, and error. There is no mention of *habeas corpus* in this charter ; yet it is stated on all hands that writs of *habeas corpus* have constantly issued ; and if not, the *certiorari* for removing convictions and orders of Magistrates would be of little value. Why set aside the judgment against a man who has been convicted by a Justice, if the man is himself to remain in gaol, and the writ of *habeas corpus* cannot rescue him ?

It is admitted that within Fort William in Bengal the Supreme Court of Calcutta is authorized to issue writs of *habeas corpus* ; therefore within the territories of Bombay, as described in the 4th of his present Majesty, the same power must exist in this Supreme Court.

It is to be a court for all “ the town and island
 “ of Bombay, and the limits thereof, and the fac-
 “ tories subordinate thereto, and within the factories
 “ which now are, or hereafter may be, subject to or
 “ dependent upon ; ” with such powers as are given
 “ within Fort William in Bengal aforesaid, or the
 “ places subject to, or dependent upon, the Govern-
 “ ment thereof.”

Thus appointed, they form a Supreme Court, which is “ to have such jurisdiction and authority
 “ as our Justices of our Court of King’s Bench
 “ have and may lawfully exercise within that part

“ of Great Britain called England, as far as circumstances will admit.” Here is a court with all the powers which the Court of King’s Bench possesses in this country. Then where is the exception which is to prevent its jurisdiction from attaching in any particular case? We find it affecting actions, suits and indictments : as affecting criminal informations, writs of *habeas corpus*, and the other high prerogative writs, it is no where to be found.

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The single decision of Sir Thomas Strange has no relation to our question. A person that was not within the jurisdiction of the court at Madras had been actually brought within it by a fraudulent process of law.

The Chief Justice there decided, “ That as where
“ a native has been brought for some purpose to
“ Madras by Government, against his will, and a
“ third party, not concerned in bringing him here,
“ attempts to take advantage of his being within
“ the limits, to hold him to the jurisdiction, it seems
“ to be agreed it is not to be permitted ; much less
“ ought it to be so in a case, where they were
“ brought here, in their necessary defence against
“ the injurious act of the plaintiff, of the consequences of which he would now take advantage
“ to fix them, contrary to the maxim that no man
“ should take advantage of his own wrong.”

1 Strange’s
Madras Cases,
p. 135.

The whole effect, then, of the only case cited is this ; that in a civil suit between individuals, where the defendant was clearly not within the jurisdiction, unless the plaintiff’s fraudulent proceeding brought him within it, such a proceeding should not enure to the benefit of the wrong-doer and the prejudice of the party wronged.

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It is truly stated, that no clause has expressly given the power of issuing mandatory writs ; but as the existence of that power is unquestionable, since it has been always exercised, and can be traced to no origin but the erection of a Supreme Court with all the functions of the English King's Bench, we have here another proof, that the words erecting it are more than a mere formula, and have received their full effect. The statute of the 21st Geo. III. is said to have made a difference not easily comprehended ; for if its object really was to prevent the 13th Geo. III. from having so extensive an operation, the change would have been brought about by a plain enactment.

No judgment was delivered in this case, but the report of the Privy Council, which was affirmed by His Majesty, was,

“ That the writs of *habeas corpus* were improperly
 “ issued in the two cases referred to in the said
 “ petition.

“ That the Supreme Court has no power or
 “ authority to issue a writ of *habeas corpus* except
 “ when directed either to a person resident within
 “ those local limits wherein such court has a gene-
 “ ral jurisdiction, or to a person out of such local
 “ limits, who is personally subject to the civil and
 “ criminal jurisdiction of the Supreme Court.

“ That the Supreme Court has no power or
 “ authority to issue a writ of *habeas corpus* to the
 “ gaoler or officer of a native court as such officer,
 “ the Supreme Court having no power to discharge
 “ persons imprisoned under the authority of a na-
 “ tive court.

“ That the Supreme Court is bound to notice the
 “ jurisdiction of the Native Court, without having
 “ the same specially set forth in the return to a writ
 “ of *habeas corpus*.”

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Before this decision had been pronounced, the Supreme Court at Bombay had closed under the following circumstances. No return having been made on the 10th of October 1828^o to the writ of *alias habeas corpus* directed to Pandoorung Ramchunder, a *pluries habeas corpus* was ordered to issue, returnable immediately, and marked in the penalty of 10,000 rupees. To this writ also no return was made; and on the 23d of February 1829, Mr. Justice Grant ordered an attachment to issue against Pandoorung, and that it should be directed to the Governor and Council, in order that they might execute it by such person or persons as they might depute for that purpose; he also directed a letter to be sent at the same time to the secretary of Government to explain the reasons of the Court acting in this manner, and enclosing copies of the affidavits and proceedings in the case. Upon the receipt of this letter and writ, the Secretary replied, that it was the intention of the Government to persist in the line of conduct expressed in the letter of the 3d of October 1828, until they received orders from their superiors in England. After this reply, Mr. Justice Grant, on the 1st of April 1829, declared that the Court had ceased on all its sides, and that he would perform none of the functions of a Judge until the Court had received an assurance that its authority would be respected, and its process obeyed, and rendered effectual by the Government of the Presidency. *Asiatic Register*, vol. 28, p. 351, *et seq.*

ON APPEAL FROM JERSEY.

26th June,
9th July,
1829.

GEORGE PHILIP BENEST - *Appellant.*
JAMES PIPON - - - *Respondent.*

The Lord of a Manor cannot establish a claim to the exclusive right of cutting seaweed on rocks situate below low-water mark, except by a grant from the King, or by such long and undisturbed enjoyment of it as to give him a title by prescription.

The possession necessary to constitute a title by prescription must be uninterrupted and peaceable, both according to the law of England, the civil law, and those of France, Normandy and Jersey.

THE respondent, on the 17th of October 1822, presented a remonstrance to the Royal Court of Jersey, and therein stated that he, as Lord of the Fief and Seigneurie of Noirmont, and his predecessors, enjoyed from time immemorial, and without interruption the exclusive right to cut the vraic* (sea weed), that grows on the rocks called L'Isle Percée, situated in the said fief, in the parish of St. Brelâde: That the respondent's ancestors had incurred considerable expense to render the access to the said rocks practicable; and that on the 8th day of April 1822, George Philip Benest (the appellant) and Mr. James Jandron, assisted by several other persons in their employ, undertook, without any right or justice, to go with a boat and cut vraic on the said rocks, and that notwithstanding the representations of the respondent, and the prohibition he made to them from continuing to cut the said vraic, they still persisted in so doing till the boat was loaded, and had carried off as much as it could contain; and he claimed damages against the appellant and the said James Jandron, to the amount of 400 livres each.

* The vraic or sea-weed is used in great quantities by the inhabitants of Jersey and Guernsey for manure, and also for fuel by the poorer classes.

The Court thereupon made a provisional order, granting permission to the respondents to notify to the appellant and Jandron that they should desist in future from going to the said rocks and appropriating the sea-weed. And that they should pay him the sum of 400 livres each order money, under a penalty of 50 sols, and of all costs, losses, prejudices, and damages.

On the 2nd November 1822, the appellant having denied the cutting of any *vraic*, the property of the respondent, an order was made that those who had any knowledge of the facts should be summoned.

After various interlocutory proceedings, the cause came on for a final hearing on the 28th of September 1826, and the evidence of many witnesses was produced on both sides.

The evidence of the witnesses on the part of the respondent went to show that the respondent and his predecessors had always cut *vraic* off these rocks, and that they claimed a right exclusively so to do; that they had a small house near the beach, where they kept their cars and implements for cutting the sea-weed; and that the rocks were situated in a small bay, surrounded by respondent's property; and that there was no way to them by land except by a private road through his estate, which had been kept in repair by him and his predecessors, although a person might go to them at low water along the beach; but this would, as these witnesses deposed, be attended with a great deal of danger. They also, for the most part, declared they had never seen, and some of them that they had never heard of any other persons cutting *vraic* off these rocks than the respondent and his predecessors, or his or their

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servants, or persons to whom they had given leave : One of them however declared that a few years ago a man of the name of Le Brocq did cut some without leave, and that an action was brought against him in consequence, but no record of this action was produced to the court, and no account given in evidence whether it was abandoned or not* ; and another of them deposed that she had seen respondent's father send away from the rocks a Mr. Abraham de Fiellastre and his crew, who came there for the purpose of cutting vraic. The respondent also produced in evidence two Acts or Judgments of the Court of Jersey, one of the 10th of October 1809, whereby the Court adjudge " that John le Scelleur " not having a right to cut vraic off certain rocks, " called ' Fara,' should pay a fine of 10 livres to the " attornies of Philip Raoul Lempriere, esq. lord of " the manor of Rozel, for having done so without " due permission, and be condemned in costs ;" and another Act of Court bearing date the 11th of May 1819, whereby John Helier de St. Croix, gentleman, was condemned to pay the sum of 20 livres, by way of damages, to Peter David Frebout, esquire, and to pay the costs of the action, for having cut vraic off certain rocks, called the " Saleurs ; the said Mr. " Frebout having proved the said rocks to have been " his property, and that the said J. H. de St. Croix " had been to cut vraic there without any right.

* It was stated in a note to Respondent's case that the action was not followed up in consequence of the death of the Lord of the Manor, and his son and heir being then abroad in his Majesty's service, but it did not appear that this fact had ever been given in evidence to the Court below.

The evidence of the witnesses on the part of the appellant was, in general, that they had frequently cut *vraic* off these rocks, and, in many cases, without any leave, and without opposition, although the respondent or his predecessors were present at the time; some of them, however, deposed, that opposition had been made to their cutting, and they had desisted in consequence; others, that in spite of the opposition they had continued to cut *vraic*, and no action had been brought against them, and in particular, the before-mentioned Mr. Abraham de Fiellastre deposed that he had loaded his boat with *vraic* from these rocks, although the Respondent's father had come up to him and told him the *vraic* was his (respondent's father's) property, and would bring an action against him, but that no action had ever been brought. The respondent also produced the report bearing date the 26th of October, 1815, of the Royal Commissioners sent to the Island of Guernsey, in the year 1815, to decide several matters therein mentioned, and amongst others, a case founded on the petition or doleance of Eleazar le Marchant, stating that he was lessee, by virtue of a lease granted to him by his Majesty of the Island and Royal Warren of Lihou, of the coast of the said Island of Guernsey, for a long term of years, and complaining that certain inhabitants of the Island of Guernsey claimed to have and exercise the right not only of cutting *vraic* (which right was admitted by him), but also of spreading and drying it over the whole of the said Island of Lihou (which right was denied by him); and his Majesty's Commissioners, in this report adjudged and determined that the Defendants in the several suits to which the said

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petition or doleance related, were not guilty of the trespasses therein mentioned, and that the inhabitants of Guernsey had a right to spread and dry the *vraic*.

The sentence of the Court was, that the appellant having admitted that James Jandron was in his service on the occasion in question, that the said James Jandron should be discharged from the action; after which, the Court confirmed the said provisional order against the appellant, except as to the damages, which were reduced to twenty livres order money; and, moreover, the appellant was condemned to pay the costs of the action incurred as against himself, and also as against James Jandron, (but leave was given him to appeal to the King in Council).

William Brougham, for the Appellant :—

The appellant in this case claims a right in the nature of a servitude, or, as we call it, an easement of cutting the *vraic* growing on the rocks of L'Isle Percée. This he claims as an inhabitant of Jersey, because by the common law of that Island all the inhabitants of it have the right to cut *vraic* on the rocks situate on its coasts, and because they have constantly exercised that right on these particular rocks without interruption, or at any rate without such continued interruption as is absolutely necessary to give to an individual a title by prescription in opposition to the general right. Forty years undisturbed possession is required by the law of Jersey to give a perfect title by prescription to all real property, excepting servitudes, to which not even 100 years enjoyment will give a right. “ *Les*

“ personnes qui ont possédé un immeuble paisible-
 “ ment, et sans interruption 40 ans, ou au delà ne
 “ pourront être inquiétés, ni molestés à l’égard de la
 “ propriété dans la chose possédée, la possession qua-
 “ draginaire donnant un droit parfait, et incontestable
 “ selon l’ancienne constitution de l’isle, excepté en ma-
 “ tière de servitude, laquelle ne peut s’acquérir par
 “ la prescription, fût elle centenaire, mais dont on peut
 “ se libérer, ou acquérir la liberté par prescription,
 “ c’est à dire, lorsque la servitude n’a point été exercée
 “ pendant 40 ans.” *Jersey Code*, p. 223*. The sort of
 possession which is required to constitute a title by
 prescription is thus described by Basnage in his
 Commentaries on the old Norman Law, which is
 the law of Jersey: “ Il faut que cette possession ait
 “ été paisible sans trouble, et sans procès, car pour
 “ prescrire ce n’est pas assez d’avoir joui, il faut, que
 “ la possession n’ait point été interrompue, et qu’elle
 “ ait été continue.” *Basnage, Tit. de prescription*,
 art. 521. In this case the evidence clearly shows
 that the exclusive right, which the respondent claims,
 has been constantly opposed, and interrupted. The
 vraie laws prove the common right of the inhabit-
 ants to the vraie, for they direct the distribution of
 it amongst all of them in fixed proportions. And

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* In the year 1771 a Code was formed from the old laws and
 customs of the island of Jersey, and approved of by an order of
 the King in Council, of the 28th of March in that year, which
 also ordered it to be entered upon the register of the islands;
 and his Majesty declared that all other political and written laws
 theretofore made in the said island, and not included in the said
 code, and not having the royal assent and confirmation, should
 be from thenceforward of no force and validity. This code was
 printed in a small duodecimo volume in 1771.

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although there is an exception to particular fisheries and lands in the 11th Section of the last Act*, yet, *prima facie* all the *vraic* growing round the Island belongs to the Public, and is so treated by these Acts. To come within this exception the respondent must make out his title, either by prescription, in which he has failed, or by deed or grant, which he has not even attempted to do.

Denman, (K. C.) and *Pennington*, for the Respondent:—

The respondent only instituted the action, from which this is an appeal, in order to support those family manorial rights, which it is the duty of every head of a family to uphold, and which have by his family been both long, and uninterruptedly enjoyed. We deny that what is here contended for is an easement. An easement must be in *alieno solo*. The respondent is Lord of the Manor, and as such we must presume that both the *vestura terrai*, and the land itself, belong to him. Forty years possession will therefore, according to the law of the Island, give him a clear title. It is proved that he and his ancestors have constantly cut and carried away this sea-weed. The rocks on which it grows are situate

* An order of the King in Council of the 11th of February 1829, confined the regulations touching "La Coupe, La Pêche, et Le Partage du Vraic," approved of by the States of Jersey on the 11th of December 1828, and which repeal the former regulations on that head, contained in the code of 1771, p. 330; the 11th sect. of the last Act is, "Cette loi n'est point entendue déroger aux Droits, qui peuvent exister à l'égard de quelques pêcheries particulières, ni aux droits de quelques Seigneurs particuliers."

close to, and are almost surrounded by his property. The only practicable way to them is through his estate, by his own private road, which has never been interfered with by the public officers, who are very strict in the performance of their duties of surveying the highways of the Island. All persons therefore, who came upon that road, or carried away *vraic* without his or his ancestors permission, were trespassers; and an established right will not be done away with by occasional trespasses, especially when the trespassers are prosecuted, as was done in the case of *Le Brocq*; the action against whom was dropped only on account of the death of the Lord who instituted it, and the absence of his son from the Island. A legitimate interruption alone could have defeated his title, *Co. Litt.* 113, b. These rocks too are clearly included in the 11th sect. of the last Act. The Court in Jersey did not come to their decision until after great deliberation. The Judges in that Court were better acquainted with the situation of the property and the usages of the Island, with respect to the gathering of the *vraic*, than this Board can possibly be; and it is to be hoped, therefore, that their judgment will not be disturbed.

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LORD WYNFORD:—

The rocks where the sea-weed grows, which was the subject of the action in the Court of Jersey, are covered with the ordinary tides. The sea is the property of the King, and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation,

See *Blundell*
v. *Catteral*,
5 Bar. & Ald.
p. 268, and

King v.
Lord Yar-
borough, 3
Bar. & Cres.
91; and Dow's
Appeal Cases,
vol. i. N.S.
178.

and of which a subject has either had a grant from the King, or has exclusively used for so long a time as to confer on him a title by prescription: in the latter case a presumption is raised that the King has either granted him an exclusive right to it, or has permitted him to have possession of it, and to employ his money and labour upon it, so as to confer upon him a title by occupation, the foundation of most of the rights to property in land. This is the law of England, and the cases referred to prove that it is the law of Jersey. In the case of *Le Marchant*, he claimed the Island of Lihou off the coast of Guernsey by lease from the King, admitted the right of the inhabitants of Guernsey to cut the sea-weed, but denied their right to dry it on the Island: This was a case of grant from the Crown. In the case of *Helier de St. Croix*, the plaintiff claimed the rocks on which the sea-weed grew, and supported his claim by evidence: this was a case of prescription, in which a lost grant was presumed, or a right, supported by long-continued occupation. This rule of law is derived from a universal principle of convenience and justice. What never has had an individual owner belongs to the Sovereign within whose territory it is situated. Whatever any Sovereign has allowed an individual to possess or improve he cannot take from that individual, because by thus doing he would take from the occupant the value of the labour which he had been permitted to expend on the property, and which must far exceed the original value of the soil.

Grotius de Ju.
Bell. & Pa.
lib. ii, c. 2,
s. 4, and c. 3,
s. 19; Puffen-
dorff, lib. 4.
c. 6, s. 4.

The Islands of Jersey and Guernsey were parts of the duchy of Normandy. The laws of Normandy were introduced into this kingdom by William the First,

and superseded the Saxon laws, which before that period were the laws of England. This circumstance accounts for the laws of England and Jersey being precisely the same with regard to land that is below the ordinary tides, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King. The inhabitants of these islands have long been in the habit of using sea-weed for manure and for other purposes. There are in the books of the Privy Council several Acts of the states of Jersey, which recognize the general right of the inhabitants of that island to this sea-weed; for they divide it amongst them according to the extent of their several farms, and appoint officers to regulate the allotments of it. One indeed of the sections of the last Act proves, that exclusive rights of cutting this weed may exist: for it prevents the law from derogating from the rights of particular Pêcheries (as they are called) of the lords of particular manors; but as, generally speaking, this sea-weed appertains to all the inhabitants of the island, it is for the person who claims an exclusive right to what grows on any particular part of the coast, to establish it, as was done in the cases referred to, and to show a title by grant or prescription. The Roman law relative to prescription has been adopted into the law of Normandy, which prevails in Jersey. We profess to act on the same principles. We say, on the authority of the commentators on the civil law, that the right which is to be supported by prescription must have existed beyond the memory of man. They have fixed on the term of 30 years as exceeding that period. Our law has carried the time of legal memory back to the return of Richard I. from the

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Section 11th
of Act of 11th
Dec. 1828.

Domat. Lois
Civiles, lib. 3,
tit. 7, sec. 4.

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Demat. lib. i,
tit. 12, sec. 1,
in notis. Brac-
ton, fols. 52 &
222 b.

Co.Litt.113,b.

Holy Land. The sort of possession that is required to establish a prescription, is the same in the civil law, the law of Jersey, and our common law. Whoever, indeed, will take the trouble to read Bracton, and our other early writers on the common law, will be surprised to find the number of doctrines they have adopted, and even whole passages, that they have transcribed from the civil law. The possession must be maintained without force; it ought not to be a secret or precarious possession; it must be a "*possessio longa, continua et pacifica, nec sit legitima interruptio*." Lord Coke has translated from Bracton the three first words of this passage in his description of the possession necessary to support a prescription, by saying it must be "long continued and peaceable." This is precisely what is said of prescription by the commentator on the laws of Normandy, which are those of Jersey. The Code Napoleon makes use of nearly the same expressions on this subject*. We agree with the counsel for the respondents that a claim is not interrupted by trespasses, if the trespassers are not known to the claimant; but if the supposed trespassers are known, if the supposed trespasses frequently happen, and no legal proceedings are instituted in consequence of them, they then become the "*legitimæ interruptiones*" which Bracton speaks of, and are converted into assertions of right.

There are many witnesses who speak to the weed being cut from the rocks in the presence of the

* "Code Civil, liv. 3, tit. 20, article 22, 29, Pour pouvoir prescrire il faut une possession continue, et non interrompue paisible, publique, et a titre de propriétaire."

respondent, his family, and his servants. It is proved that parties were ordered to desist from so cutting it; that the parties continued to do so, and that no action was brought. In some cases actions were threatened, but the threats were not followed up. In one case, we are told, an action was commenced against a man of the name of Le Brocq; but it does not appear to have been persisted in, and we have no account given us in the evidence of the reasons why it was given up. The respondent's counsel have indeed told us it was not carried on, because the gentleman who brought it died before it came to a hearing, and his son and heir was absent from the island. This would have been a good explanation, but no proof whatever of it is laid before us. The respondent has scarcely any evidence to support his claim; and much, that ought not to have been received, was admitted, and acted upon by the court below. Witnesses were even permitted to say that the respondent believed he had an exclusive right to the weed which grew on these rocks, and that they had heard persons say, he had that right. The belief of the respondent in the justice of his claim cannot be attended to; by admitting it as evidence you in effect make him the judge of his own case. What has been said by other persons can in no case be proved without showing, who these persons were, and that they are dead. If the persons can be called, whose accounts are to be spoken to, they should be called, and give their accounts on oath. Hearsay evidence is never received but from necessity. We are therefore of opinion that this judgment should be set aside; but we do not, however, mean to establish the right of Mr. Benest

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without further inquiry. It does not appear, in this case, whether the *vraic* growing on these rocks was ever allotted for the use of the inhabitants by the proper authorities of the island: it never seems to have occurred to the court below, that any inquiry as to this circumstance was material. We think it most material. If it has been allotted, it will be decisive against the respondent's claim. If it has not, some reason may be discovered why it has not been so, otherwise the neglect to allot it will give colour to the respondent's claim.

Judgment of court below reversed.

Costs, if any had been paid, to be returned, and a new trial directed.

ON APPEAL FROM THE ISLE OF MAN.

WILLIAM HENRY BLACHFORD, AND
 MARGARET SUSAN HIS WIFE,
 (Heiress-at-law of Thomas Henry
 Skinner, deceased) - - - } *Appellants.*

And

CATHERINE CHRISTIAN - - - *Respondent.**

THIS was an appeal from a Decree of the Court of Chancery of the Isle of Man, of the 6th of March 1828, and also from certain preliminary orders made in the same cause. The suit was instituted for the purpose of setting aside two deeds of the 10th of August and the 3rd of September 1818, on the ground that the Rev. William Fitzsimmons, the grantor in both of them, was of unsound mind at the time that he executed them, and that they were obtained from him by fraud and undue means.

Mr. Fitzsimmons had, in the year 1816, conveyed all his estate at Glenroy to Matthew Kelly upon certain trusts, under which his niece Elizabeth Banks claimed a life-estate. This conveyance contained a power of revocation, and was retained by Fitzsimmons in his own possession; it was alleged too to have been burnt or destroyed by him; soon, however, after the execution of the deeds of August and September 1818, by which he conveyed the whole of his real property to persons under whom the appellants claimed, and who were no relations to him, Mrs. Banks filed a bill for the purpose of setting them aside on the same grounds as were

30th June,
 3d July,
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Deeds set aside, the execution of which had been obtained by imposition from an imbecile old man.

A degree of weakness of mind, far below what would be necessary to justify a commission of lunacy, if it has been taken advantage of to procure the execution of a deed, will be sufficient ground for setting that deed aside.

When the Chancellor of the Isle of Man has referred a case to six members of the house of Keys chosen by the parties,

he is not bound by their decision, but may again refer the case to six other members of his own selection.

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alleged in the present suit, and also to restrain the proceedings in an action which had been commenced against her by the persons claiming under those deeds, in order to obtain possession of the estate at Glenroy, which she had till that time occupied by virtue of the conveyance of 1816. In this suit she was unsuccessful, both in the Court of Chancery in the island, where her bill was dismissed, and in the Privy Council, where on appeal the decree of the Court below was confirmed. Fitzsimmons died in the month of April 1819, having been at the close of the previous year found a lunatic by a jury, from a time however subsequent to the execution of the deeds of the 10th of August and 3d of September. Christian Kelly, who was his heiress-at-law, being at the time of his death a very old woman, and in her dotage, guardians were appointed to her by an order of the Court of Chancery, and they, on the 31st of May 1822, filed the bill, which commenced the present suit. The respondent became a party to it on the death of her mother Christian Kelly by a bill of revivor, and supplement. The original bill charged that both the deeds of 1816, under which Mrs. Banks, and the deeds of 1818, under which the appellants claimed, were void, and prayed that they might be declared so, and that Christian Kelly might be put into possession of the lands of Fitzsimmons as his heiress-at-law, and that a committee of the house of Keys might be ordered to inquire into the matters of fraud and deceit charged against the defendants, according to the Act of Tynwald, of 1731*.

By an Act of Tynwald, of the year 1731, it is enacted, with reference to frauds and deceits complained of by Bill in

A committee of six members of the house of Keys was accordingly appointed, and they on the 17th of February 1827 reported "that no fraud was used" or resorted to to obtain the deed of the 10th of "August 1818." On the 22d of June 1827, however, the Lieutenant-Governor, who also acts as Chancellor, declared that report incomplete, because it did not extend to the deed of the 3d of September, and the proceedings in the cause were therefore remanded to the Commissioners to report "whether Fitzsimmons was at the time of the execution of the deeds of the 10th of August and 3d of September 1818, of sound mind, memory, and understanding, or how otherwise; and whether any fraud or imposition was practised in obtaining those deeds." Upon this order the Commissioners made a second report, "that it not appearing that the Rev. William Fitzsimmons was of unsound mind, memory and understanding at the period of his executing the aforesaid deeds of the 10th of August and 3d of September 1818, they were of opinion that no fraud or imposition has been used or resorted to to obtain the deeds in question."

On the cause coming on for hearing the Chancellor declared that this report also was insufficient, and not applicable to the terms of the order of the 22d of June, and he ordered it to be referred to six other Commissioners, named by himself, to make the

Equity, "that when the defendant joins issue the Chancellor, for his better information, shall direct the examination of the matter to six of the twenty-four Keys, by way of commission, to inquire into the same, by oath or otherwise, as the case shall require, and then to make their report of the whole impartially upon oath."

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same inquiry as was directed by the order of the 22d of June. Against this last order the appellants presented a petition for leave to appeal to the Privy Council; this was refused by the Chancellor, as was also an application by them for further time; and on the 21st of February the new Commissioners made their report. It was, "that Fitzsimmons at the " time of the execution of the deeds or instruments " of the 10th of August and the 3d of September, " 1818, was not of sound mind, memory and under- " standing, and that imposition was practised in " obtaining the said deeds."

The decree made upon this report on the 6th of March 1828 ordered the two deeds to be vacated, annulled, and set aside, and that the respondent's costs should be taxed, and she should be at liberty to apply to the Court in a summary way for the payment of the same.

The effect of the evidence taken before the Commissioners, and the nature of the deeds, may be collected from Lord Wynford's judgment.

Adam (K. C.) and *Stuart*, for the Appellants.

Knight (K. C.) and *Campbell*, for the Respondent.

The principal cases referred to in the course of the argument were *Bennett v. Vale*, 2 Atk. 324; *Evans v. Blood*, 3 Brown Parl. Cas. 632; *Filmer v. Gott*, 4 Brown Parl. Cas. 230; *Watt v. Grove*, 2 Scho. & Lef. 491; *James v. Greaves*, 2 P. Wms. 270; *Willan v. Willan*, 16 Ves. 72, & 2 Dow, 278; *Taylor v. Obee*, 3 Price, 83; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Willis v. Jernegan*, 2 Atk. 251; *Bates v. Graves*, 2 Ves. jun. 287; *Bridgman v. Green*, Wil-

mot's Notes, 61, & *Lord Donegal's Case*, 2 Ves. sen. 408.

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Lord WYNFORD :—

The law will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no court of Justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property ; indeed, from the fluctuation in prices, owing principally to the gambling spirit of speculation that unhappily now prevails, it would be difficult to determine what is an inadequate price for anything that is sold : at the time of the sale, the buyer probably calculates on a rise on the value of the article bought, of which he would have the advantage ; he must not therefore complain if his speculations are disappointed, and he becomes a loser instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood ; a bargain, therefore, into which a weak one is drawn under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man. If this conveyance could be impeached on the ground of the imbecility of Fitzsimmons only, a sufficient case has not been made out to render it invalid ;

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for the imbecility must be such as would justify the jury, under a commission of lunacy, in putting his property and person under the protection of the Chancellor ; but a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed. This observation will reconcile the judgments of Lord Chief Justice Wilmot, in Wilmot's Reports, with that in 2 Ves. p. 407. In this case almost all the circumstances that have been stated in the cases referred to at the bar, and also in that of *Clarkson v. Hanway*, 2 Peere Williams, 204, (which has not been mentioned by the counsel on either side,) as grounds for setting aside deeds are to be found. Fitzsimmons at the time he executed these deeds was of the age of 74 ; his health was declining, and his mind evidently sympathized with his body. The caution, that he observed in the conveyance to his niece (for whom, at the time he made it, he had a great affection), had deserted him ; he made the deed to his niece revocable, and kept it in his own possession. These deeds are irrevocable ; he deposited them with Kissack, who was no relation to him ; he kept neither copy or counterpart of them ; and before the year closed (in the August and September of which he executed them) he was found a lunatic, by an inquest, and in the Spring of the following year he died. The attorney who prepared the deeds was employed by Skinner, to whom the estates were conveyed by them ; they were executed at the house of Kissack, a near relation of Skinner,

and to whom the houses were given on failure of Skinner's issue; no drafts were ever made of the deeds before they were written on parchment: so that Fitzsimmons had no opportunity of reading them over himself, or of having them read over to him, or of suggesting any alteration in them before they were executed. There is an excellent law in the Isle of Man, which requires, that after deeds are executed the parties should appear before a Magistrate, acknowledge their deeds, and pray to have them registered. This law affords no protection against imposition, if the Magistrate be not entirely independent of the parties to the deeds, and unconnected with the transaction to which they relate. In this case the attorney, who as the agent of Skinner had prepared the deeds, was also the Magistrate before whom the parties acknowledged them. All these suspicious circumstances would have been sufficient to invalidate the deeds, although the conveying party could not have been proved to be in such a state of mental imbecility, as would have supported a commission of lunacy. But let us consider the deeds themselves, and see if any reasonable man can say, these are the deeds of a man of sound intellect, fairly exercising his mind, uninfluenced by falsehood, and unswayed by deceit. An old man, feeble both in body and mind, separated from all his relations, without a friend to advise him, and surrounded by those only who were contriving to get his fortune, conveys away nearly all that he is possessed of to persons not related to him either in blood, or connexion. All his property that he has in his own possession, even the house in which he lives, is to pass from him to these strangers imme-

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diately ; all his estate that is in lease is to become the property of the same strangers after his death. The attorney, who prepared the deeds, knew that it was necessary to introduce into them some consideration for this grant ; he inserted 100*l.* as the consideration for conveying away property worth 1,400 *l.* Although great part of this property was immediately to pass to the grantees, the 100*l.* was not to be paid to the grantor, but to his executor after his death, without any interest being charged on it in the mean time. It must have occurred to the attorney, that the 100 *l.* to be paid in the manner, this was to be paid, would not be regarded by any court as a legal consideration, he therefore added the further consideration of natural love and affection. This has never been considered as a valid consideration, except where duty may be supposed to combine with inclination to give effect to it, as in the cases of parents, and children, brothers, and sisters, uncles and aunts, nephews and nieces. The grantees in this case were not related to the grantor in any degree whatever. There is not an allegation in either deed that is not substantially false. The deed of the 10th of August 1818 recites a deed of the 3rd of November 1817, conveying part of the estate from one Quayl to Fitzsimmons. No such deed was in existence on the 10th of August. It was executed afterwards, and dated the 3rd of November 1817, to make it correspond with the recital of it in the deed of the 10th of August 1818. To combat this proof of fraud the attorney first swore that the recited deed was executed in November 1817, but he afterwards acknowledged that his evidence was not true. The deed of the 3rd of September 1818, states, that the object of

that deed was to insert the names of some fields which were intended to be conveyed by the foregoing deed, and which had been omitted. A plain man would understand from these words that the fields had been omitted from inadvertency; now the fact is, that these fields had not on the 10th of August 1818 been conveyed to Fitzsimmons, but the legal right to them was in Quayl at that time. Perhaps the deed of the 10th of August, if properly made, would have assigned the equitable interest which Fitzsimmons then had in these fields; but why was not a true account given of the property? False statements are evidence of fraud, even although what is falsely stated may be immaterial. The parties must have thought it material to make such false statements; for although persons are sometimes weak enough to state falsehoods, they are not foolish enough to do so except, when they think that they may thereby advance their interests. Whenever parties are detected in such falsehoods, you have no security that anything alleged by them is true. It is admitted at the bar that they must be considered as voluntary conveyances, and yet you find in one of them a clause which is seldom to be found but in a conveyance for a full consideration. The grantor is made to undertake for the title of the estates which he is giving to the grantees. Considering the terms on which they were to obtain the estates they might have taken them for better for worse without any warranty. Deceit and fraud must be matters of proof, and of contradictory proof. The Court, whose duty it is to detect fraud, must not be fettered by rules. If it be so fettered fraud will keep out of its reach. In this case, however, there is no difficulty:

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all the facts unite to form one consistent body of proof of imbecility in one party, and cunning and deceit in the others, who were concerned in this transaction.

But it has been insisted that by the law of the Isle of Man the Chancellor was obliged to refer this case to six members of the House of Keys; that those members were to be chosen by the litigant parties; and that after the members so chosen had made their report, the Chancellor was bound to decree according to that report, and could neither make a second reference to other members of the House of Keys, nor select the members, who were to make the inquiry. Although the Chancellor must submit the question to the members of the House of Keys, he is not bound by the first verdict, but may send it to other members of that house for further inquiry. The Isle of Man is so small that it must be difficult to find an unprejudiced jury. If the court had no power to direct a new trial property in that island would be insecure. We have had no evidence of any custom which regulates the mode of choosing the members of the House of Keys who are to assist the Chancellor. The words of the Act of Tynewald indicate that they are to be selected by the Chancellor. He is, for his better information, to direct the examination of the matter to six of the House of Keys by way of commissioners. The two first commissions granted in this case were imperfectly executed, and could not be acted on. The last commission fully reported on all the facts submitted to them; that report satisfied the Chancellor, and it has satisfied us. This appeal therefore must be dismissed, with costs.

ON APPEAL FROM THE CAPE OF GOOD HOPE.

The President and Members of the }
Orphan Board - - - } *Appellants.*

versus

JOHANNES GYSBERTUS VAN REE- }
NEN (who had died since the }
entry of the appeal), and SAMUEL } *Respondents.*
BAYLEY (who had been appoint- }
ed in his stead*) - - - }

9th and 17th
July, 1829.

FROM the year 1799 to the year 1801, the respondent Johannes Gysbertus Van Reenen, and John Frederick Veyll, who were partners under a verbal agreement, supplied the troops at the Cape with fresh meat. In 1801 they entered into articles of partnership with each other, and this partnership continued,

Petition for leave to appeal need not be presented to the King in Council within a year after leave to appeal has been refused by the court below.

An action is brought against D. as the executor, and also as husband of the sole heiress, under a will. A few days previously to the final sentence in the Court below D.'s wife dies, leaving him by her will joint heir, with her children, of her property, and appointing the O. C. guardians of the children. Both D. and the O. C. (who had not previously been parties) petition the Court below for leave to appeal, who refuse it to the O. C. but grant it to D. Held, that the O. C. had a right to intervene after sentence, for the purpose of appealing, and to prosecute their appeal, although the appeal of D. had been dismissed for non-prosecution.

If an appeal is dismissed on account of the neglect of the guardians of infants to bring it to a decision, the infants when they come of age will have a right to revive it.

An appellant is not permitted to insist that the judgment against which he has appealed is void for want of the parties to the suit in which it was made, the objection not having been taken in the Court below.

Accounts may be opened after a final settlement acquiesced in for five years, if circumstances tending to show fraud in one of the accounting parties are then discovered, and he then agrees to submit them to arbitration.

Award invalid if one of the parties to the reference dies before it is made, unless the heirs of the parties are expressly named in the submission to arbitration.

* Ex relatione.

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with some interruptions, until the 2d of June 1810. when they executed to each other an instrument in these terms : " We, the undersigned, acknowledge
 " to have settled and accounted every thing, one
 " with another, and that our partnership in the
 " Government butchery is ended ; and as the first
 " undersigned has no further portion or part therein,
 " we acknowledge that the bond for 13,900 rix dol-
 " lars is dated one month back on account of
 " arrangement, with the interest ; we also mutually
 " promise each other, with respect to our pending
 " suit with Goetz, each to pay his share of the
 " costs.

(signed)

" *J. G. Van Reenen.*

" *Jchn Frederick Veyll.*"

Goetz was a person admitted for some time to a share of their partnership and profits, part of which he insisted Van Reenen and Veyll unjustly withheld from him, and in 1811 his heirs recovered from them, by a judgment of the Court of Justice in the Colony, between 14,000 and 15,000 rix dollars. Veyll was the acting partner and sole manager at all the places where the business was carried on, but during the time of Goetz's suit Van Reenen got into his possession all the partnership books.

Institution of
 suit by Van
 Reenen
 against Veyll,
 and reference
 to arbitration.

In 1815 Van Reenen instituted a suit against Veyll for revision of the partnership accounts up to the year 1809 inclusive.

The Court of Justice having by an order of the 17th of August 1815 referred this case to Commissioners for amicable settlement, the parties appeared before them on the 14th of September, and agreed to refer the accounts to arbitrators ; and on the 18th of

October they executed a bond, in the presence of a Notary, in which they bound themselves at all times to abide by the award of the arbitrators, and consented that the award should be made a rule of the Court.

Whilst the arbitrators were examining the account, and before they made their award, Veyll died, having by his will appointed his sister, who was married to a person of the name of Durr, sole and universal heiress of all his property, and Durr her husband his executor.

Durr could not obtain for three years administration to this will, which was disputed: and during the pendency of this dispute he declined attending the arbitrators, and protested against their taking the accounts. The Court of Appeal in the colony, notwithstanding this protest, by an order of the 15th of September 1818, directed the arbitrators to proceed; but on the 28th of December in the same year the same Court by another order rescinded their former order, and remitted the case to the Court of Justice. The reasons for these contradictory decisions were not stated in either the appellants or the respondents cases.

On the 19th of January 1819 the arbitrators awarded that there was due from the estate of Veyll the sum of 116,454 rix dollars, 5s., 3½, and on the 21st of the same month exhibited their award to the Court of Justice. An action was then commenced in that Court by Van Reenen to enforce the payment of this sum by Durr; Durr pleaded *homologation* and *Acquiescence* in bar of this action; and his plea having been on the 6th of July 1820 overruled, he appealed from this sentence to the Court

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Death and
will of Veyll,
appointing his
sister his
heiress, and her
husband his
executor.

Will of Veyll
disputed.
Orders of the
Court of Appeal
directing the
arbitrators
to proceed, and
again rescinding
this decision.

Award of the
arbitrators.
Action commenced
on the award.
Durr's plea
to it overruled
by the Court
of Justice.

Their sentence
confirmed by
Court of
Appeals.

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Court of Jus-
tice reject the
claim esta-
blished by
award.

Appeal of
Van Reenen
against this
sentence, and
reversal of it
by Court of
Appeals.

of Appeals in the Colony, which, on the 2d of October 1820, pronounced his case inadmissible in appeal. Against this sentence he asked leave to appeal to the King in Council, and his application was refused. The appeal having been thus disallowed, the Court of Justice, on the 5th of December 1822, went into the merits of the case, and rejected the claim established by the award. Van Reenen appealed to the Court of Appeal against this decree, and offered in evidence to it a return of the number of soldiers who were at the Cape during the time that he and Veyll supplied the troops with fresh meat, for the purpose of showing that Veyll had not in his accounts allowed him profit on all the meat that must have been supplied. The Court of Appeal received this evidence, which had not been produced before the Court of Justice, and, on the 18th of September 1823 reversed the sentence of that Court, and admitted the claim of Van Reenen for the exact sum found to be due to him by the arbitrators.

Joint will of
Durr and his
wife.

Previously to this decree Mr. and Mrs. Durr had made a joint and mutual will and testament, bearing date the 6th of August 1823, whereby "they agreed
" to nominate and institute as their sole and univer-
" sal heirs the survivor of them jointly with the chil-
" dren of the survivor in equal shares, and the sur-
" vivor of them declared to nominate as his or her
" sole and universal heir the joint children of him or
" her the survivor in equal proportions, and they de-
" clared to nominate and appoint the appellants their
" executors and guardians over their minor heirs."

Death of Mrs.
Durr.

Mrs. Durr died on the 11th of September 1823, and thereupon the appellants, who are a corporation, instituted at the Cape, as well as in most of the

other Dutch Colonies, for the purpose of administering the property of orphans, entered upon the duties of their offices under the will.

On the 26th of the same month Durr, on his own account, and the Orphan Board, the appellants in this case, petitioned the Court of Appeals for leave to appeal against their sentence. On the 9th of October 1823 the Court granted permission to appeal to Durr, and refused it to the Orphan Board.

His Majesty, by an order in Council, dated the 3d of May 1826, was pleased, on the petition of the appellants, to order that the Court of Appeals at the Cape of Good Hope should rescind their order of the 9th of October 1823, so far as the same might preclude the appellants from appealing to the Privy Council; and that they should be at liberty to take up and carry on the said appeal, without prejudice to the respondents right on the hearing to object to their competence to appeal against the decree, or to join or intervene in any such appeal.

This appeal having abated by the death of Van Reenen was revived by an order of Council of the 14th of February 1829, and Samuel Bayley admitted to support the interest of his children.

Durr's appeal was dismissed by an order of Council on the 30th of January 1826, because it was not followed up within a year from the day in which it was allowed.

The case was argued, firstly, upon the point whether the appellants had not lost their right to appeal.

Adam, (K. C.) and *Carr*, for the Appellants:—

The Orphan Board, as representing Veyll's child-

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Leave granted
by Court of
Appeals to
Durr to ap-
peal, but re-
fused to appel-
lants.

Leave granted
to appellants
to appeal on
petition to the
King.

Death of Van
Reenen, and
appointment
of Bayley to
support in-
terest of his
children.

Dismissal of
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ren, have such an interest as entitles them to intervene; any party that can show that he is likely to be affected by a judgment in a suit between other persons, may intervene, although such intervention be opposed by both the litigant parties. Voet, in his Commentary on the Pandects, lib. 5. tit. de Judiciis, numero 35, says, "Invito litigantium utroque intervenit tertius, qui cum ejus quoque verteretur in eâ lite dispendium, dum res inter istos duos contententes judicatur, ipsi quoque tertio nocitura, collusionis impediendæ causâ sese litigantium alterutri socium addit." Again, in numero 36, in medio, "Non etiam interest in quo loco jam lis sit cui quis sese adjungere desideret, nam sit ante, sit post litem contestatam, imo sit post conclusionem in causâ, tertium sese liti alienæ pro suo jure immiscere nihil vitat, aut etiam post appellationem ab alterutro litigantium interpositam apud judicem superiorem." They also referred to the Digest, l. 49. tit. 1, De Appellationibus, l. 5, and to Peresius Prælectiones in Codicem, lib. 7. tit. 62. sec. 3. p. 601.

Brougham, (K. C.) and *Henry*, for the Respondents:—

The Privy Council has already decided that Durr has lost the benefit of his appeal by not presenting it in the time prescribed by them after he had obtained leave to appeal. Those who take up the cause of Durr cannot be in a better situation than Durr was himself in. As the way is now closed against the principal it is also closed against any intervener. Gail's Practical Observations, lib. 1. Observatio, 71, Nos. 18, 19. The intervener is bound by the

laches of the principal, Voet, lib. 5, tit. 1. sec. 39; Vander Linden, in his Judicial Practice, book 5, sec. 4, pp. 176 and 177, says, "It sometimes happens that
 " in the place of the original defendant, another, on
 " account of the considerable interest which he has
 " in the cause, takes up the defence for him. This,
 " in practice, is styled intervention; and such a
 " person styles himself in the pleadings as inter-
 " vening, and making party in the cause for the
 " defendant. This mode of procedure is usually
 " acceded to on the part of the plaintiff, provided
 " that the sentence to be pronounced on the part
 " of the Court be executable against the original
 " defendant also. The distinction between an in-
 " tervention and joinder consists in this, that in the
 " latter case the original defendant continues to be
 " a party to the suit, whereas in the former he is
 " altogether omitted in the suit. Interventions and
 " joinings in suits may be resorted to by both
 " parties according to the nature and exigency of
 " the case, and as such, not by the defendant alone,
 " but also by the plaintiff, and that in all parts of
 " the process. A joinder can be effected in appeal,
 " but of interventions that cannot, at least so gene-
 " rally, be affirmed; for when a person had a sentence
 " to his prejudice, and appealed therefrom, and did
 " not appear on the appointed day, but a third
 " person intervened in such second suit, the Court,
 " at the petition of the respondent, granted a com-
 " paruit." The granting a comparuit is in fact a
 judgment by default. As judgment has been given
 in default against Durr, and that judgment has there-
 fore precluded the appeal of the Orphan Cham-
 ber. Their claim too, is, independently of this,

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barred by their not having presented their petition to the King in Council within a year from the day on which leave to appeal had been refused them by the court below.

Lord WYNFORD:—

It has been insisted at the bar that the Orphan Board should not be permitted to become parties in this cause; firstly, because the interest of Veyll's children was represented by Durr, and Durr's appeal having been decided against him on account of its not having been brought to a hearing within the year from the time that he was permitted to appeal, the right of the Orphan Board to intervene is gone; secondly, assuming that the right of the Orphan Board is not dependent on that of Durr, that board not having petitioned the King for leave to appeal within a year from the day that the Court of Appeal in the Colony refused to allow them to appeal, they cannot be heard at this distance of time.

If the right of the Orphan Board had been dependant on that of Durr the decision against him would have barred their right. The passages cited by the respondents counsel from Gail's *Observationes Practicæ*, and from Voet's *Commentaries on the Pandects*, would decide that point, but it requires not the authority of those learned writers. It is a principle of common sense and of universal convenience, that he who claims under another must be in the same situation as the person from whom he claims. The accessory has nothing but what he derives from his principal. If the cause has been decided against the principal, and no appeal is left

to him, the accessory is equally bound by the decision. There would be no end to litigation if when a party against whom a suit had been finally determined died, his representatives might re-agitate the question decided. Durr, during the life of his wife, represented the whole property in dispute, for it all belonged to his wife, and he sued in her name; but she died before the decision of the Court of Appeal. On her death the Orphan Board, by her will, became entitled to her childrens interest independently of Durr. As soon as the decree was pronounced in the Court of Appeal the Orphan Board desired to intervene, as representing the children, and Durr desired to appeal on his own behalf. The claim of the Orphan Board being entirely independent of that of Durr could not be affected by his appeal. The passages referred to by the counsel do not bear upon this case. If the right of the Orphan Board does not depend on that of Durr, then the decision in that case does not bar their rights. By the Civil Law and the law of Holland they had a right to intervene. When we say that those who have a derivative right are barred by a decision against the person from whom that right is derived, we mean a final decision pronounced in the lifetime of the party against whom it is given. If it affects the property left by that person, and there be a right of appeal, that right will survive for those to whom by law the property of the deceased belongs.

The principle of the law of intervention is, that if any third person considers that his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but has a right to intervene, or be made

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a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings. The intervener may come in at any stage of the cause, and even after judgment, if an appeal can be allowed against such a judgment. He may not know of the existence of the cause, or he may have no interest to interfere, until he applies to intervene. The Orphan Board in this case were not interested in the matter in dispute until the decease of Mrs. Durr; and immediately after her death they applied to intervene. It is immaterial in what state the cause is in, if at the time of the intervention the proceedings are not deranged by it. In the Digest, l. 49, tit. 1, l. 5, it is laid down, that "no person is admitted to appeal against a sentence pronounced in a cause litigated between other parties, except for some just cause, as, when one suffers himself to be condemned in a cause to the prejudice of his co-heirs, or in any other case of the like kind." Many other cases are mentioned in this law in which a third party has a right to intervene. They are only put as examples, the rule which they establish, extending according to the words of this law to all cases of the same sort, that is to all cases where the party may have an interest in the event of the suit. The same doctrine is confirmed by Voet, in his Commentaries on the Pandects, lib. 5, tit. de Judiciis, sec. 35, 36, and by Peresius, in his Prælectiones in Codicem, lib. 7, tit. 62, sec. 3. The latter author says, "a third party may intervene whenever he becomes interested in a cause that is pending."

See also Voet,
 Comm. ad
 Pand. lib. 42,
 tit. 1, sec. 29.

The counsel for the respondents referred to Vanderlinden's Judicial Practice, p. 177, for the purpose

of showing that an intervention could not be permitted in appeals. This passage does not prove that in no case of an appeal can an intervention be allowed, but that interventions in appeals are not so frequently allowed as joinders are. The case referred to by that learned writer was most probably a case in which the right of the person intervening was dependent on that of a litigant party, whose laches had already put him out of court, and then it comes within the principle of the passages that have been already adverted to*.

It is insisted that when the appellants were refused an appeal by the Court below they should have petitioned the King within one year for leave to appeal to his Majesty in council. There is an established rule, that if an appeal be granted the party must bring that appeal to a hearing within one year, unless he obtains further time for the prosecution of it from this Board, and the respondent may call upon us to dismiss the appeal on account of the delay in presenting it. This rule has never yet been extended to a case where the appeal has been refused by the Colonial Court. It is to

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* Although intervention is unknown in our courts of law and equity it is admitted in the practice of our Ecclesiastical and Admiralty Courts, see Oughton's *Ordo Judiciorum*, tit. 14, and Clerke *Praxis Admiraltæ*, tits. 38, 39. In *Dalrymple v. Dalrymple*, 2 Haggard's Cons. Rep. 137, a party was allowed to intervene after an appeal from the Consistory Court to the Court of Arches, and not having put in her allegation on the day assigned for that purpose, the Judge rejected her prayer for further time, and concluded the cause. From this decision she appealed to the Delegates, who received her appeal, and allowed her further time. See also, on the doctrine of intervention, *Marquis of Donegal v. Chichester*, 3rd Phillimore, 586, and *Chichester v. Donegal*, 1st Addams, 5, & 6th Maddock, 375.

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be hoped that appeals will rarely, if ever, be refused to parties who have any pretence of interest. The King is anxious that complete justice should be done to all the inhabitants of the provinces belonging to his empire, and has directed the Governors of those provinces to allow appeals to himself in council. Should, however, a case occur in which an appeal has been refused, and the party has neglected to follow up the appeal allowed on petition to the King for an unreasonable time, we shall feel it our duty to recommend his Majesty to dismiss it. As, however, we are guided by this rule; as the respondent has not petitioned to have this appeal dismissed, but takes this objection for the first time when it is called on for decision; as it comes from a distant colony, and affects the interests of infants, we do not think it proper to advise his Majesty to dismiss this appeal on the ground of the delay that has occurred in its prosecution. If his Majesty were to dismiss this appeal on account of the neglect of their guardians to bring it to a decision, when the infants attain their full ages they would have a right to revive it. Infants are not to be prejudiced by the negligence of their guardians. On the contrary, according to the civil law, as laid down in the Digest, lib. 4, tit. 1, l. 8, "Minors, although defended by their guardians or curators, may afterwards, on their causes being heard, be released from judgments pronounced against them." Domat. in his treatise Sur les Loix Civiles, lib. 4, tit. 6, sec. 2, No. 9, says, too, "Minors procure sentences or decrees of Courts of Justice, to which they have been parties, to be reversed if their interest has not been sufficiently defended." This is also the law of Scotland according to Erskine.

“ Restitution lies not only against extrajudicial but
 “ judicial acts *exempli gratia*, the sentence of a Judge,
 “ though pronounced in *foro contradictorio* when
 “ the proper assignations or defences, either in law
 “ or in fact have been omitted, or when others false
 “ in fact, or hurtful to the minor, have been offered
 “ to the court by his guardians; but if the proper
 “ pleas or defences have been offered for the minor,
 “ and repelled by the Judge, there is no place for
 “ restitution, since the lesion or hurt arises purely
 “ from the iniquity in the Judge, to which majors
 “ and minors are equally exposed.” Erskine’s Insti-
 tutes, l. 1, tit. 7. sec. 38. When, therefore, we find
 this doctrine of the civil law adopted by a French
 commentator, and the Courts of Justice in Scotland,
 and when we also find it consistent with natural jus-
 tice, and we are told of no Dutch law excluding it from
 their system of jurisprudence, I can see no reason
 why we should not consider it the law of Holland.
 The failure of the appeal in this instance would not
 be on account of an error in the Judge, but from the
 negligence of the guardians, for which the infants
 ought not to suffer. If we were to advise his Ma-
 jesty to dismiss the appeal on the ground of delay
 in its prosecution, the infants would be entitled to
 renew it when they attained their majority.

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The right of the Orphan Board to appeal having
 been decided the case was then argued, by the same
 counsel on both sides*, and at the termination of

* The editor unfortunately has no notes of this argument, but
 the principal points taken in it appear to be very fully stated
 in the judgment.

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that argument Lord Wynford gave the following judgment :

The appellant having been permitted by us to proceed with his case, he has attempted to get rid of the judgment of the Court of Appeal in the Colony by a formal objection, and to prevail on us to allow the judgment of the Court of Justice to stand as a judgment unappealed from. It being his Majesty's wish that justice should not be defeated by formal objections, we cannot permit this attempt to succeed. If the formal objection had been fatal to the judgment of the Court of Appeal we would have advised his majesty to have allowed another appeal, under which the judgment of the Court of Justice might have been examined, so that we might know whether that judgment was according to the justice of the case in which it was pronounced ; but we think that this objection ought not to prevail. The objection is, that the judgment was pronounced after the death of Mrs. Durr, and that as she was the real party in the cause, her husband only appearing in the name of his wife, the suit was abated at her death, and therefore the judgment was void. But the appellants have appealed against that judgment, and treated it by such appeal as an existing judgment ; they say, indeed, that the respondents were proceeding to enforce the judgment, and therefore they were obliged to appeal : but they should have applied to the Court to set aside the proceedings, and if the Court had refused to set them aside then they might have appealed. Instead of taking this course, they made no complaint to the Court in the

Colony, which would have afforded the redress that under the circumstances they were entitled to, but put the parties to the expense of an appeal to the King in Council, against what they here say is a nullity, and which, if they are right in so saying, they should long ago have made out one. But Durr, who was the party before the Court, was alive at the time of the judgment: he was the person that the Court was to consider, as the party in the cause, whilst he was living, particularly as on the wife's death he himself became directly interested, and therefore the suit would not abate. We have something analogous to this in our law of ejectments. The plaintiff in ejectment is an imaginary personage: he, as it has been said, never dies; and although the person, for whose benefit the action is brought, dies pending the action, the suit is not abated.

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We come now to the real merits of the case. The appellants insist that Veyll and Van Reenen having settled their accounts, and no attempt having been made to dispute their accuracy for five years after the last settlement, they ought not to be opened; and that the Court of Justice acted rightly in giving their judgment against the respondents, who insisted that there were great errors in those accounts, and that, if those errors were corrected, there would be a large balance in their favour. The respondents insist that the arbitrators chosen by the parties having found that a large balance was due to them, (although one of the parties to the reference died, before those arbitrators made their award, and they proceeded, hearing one side only,) the Court of Appeals acted legally in receiving the award, and giving judgment against the

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appellants for the sum found by it to be due from them to the respondents.

When accounts have been deliberately settled, and the settlement has been acquiesced in for years, the party who desires to open them must make a very strong case. When accounts are settled, parties are in the habit of destroying vouchers, as being by the settlement rendered useless. If delay takes place, persons, who could explain transactions, may be dead, or not to be found; many very material circumstances will be entirely forgotten, and the recollection of many men will be too faint to enable them to give a satisfactory explanation of any transaction. But if there are manifest errors, if one accountant confided in the other, and his confidence appears to have been abused; if there be such evidence of fraud having been practised by one party or the other as requires an answer, and no satisfactory answer is given, and if the delay in not applying to have those errors rectified can be accounted for, settlements under such circumstances ought not to prevent Courts of Justice from opening accounts. The first object of law is to protect the weak against the strong; and those who confide against those, who are too much disposed to take advantage of the confidence reposed in them; and in all cases it endeavours to prevent fraud from being successful. If Courts of Justice were to give any effect to such settlements as the one now before us, this object of the law would be defeated. In this case there is most cogent proof of such errors, as could not have been occasioned either by mistake or by accident. In Veyll's books there are accounts of the sale of many sheep and bullocks, for the profits of which no credit is

given to Van Reenen. A witness has indeed proved; that sheep and bullocks were bought on the separate account of Veyll, and not for the partnership. Why were they then all entered in the partnership books without anything to distinguish them from the property of the firm? Again, the weight of the carcasses, the profit of which is accounted for, is so much below the common size, that it is insisted the meat would not have been received by those, whose duty it was to see, that the soldiers were supplied with proper food. The carcasses accounted for would not have furnished nearly the quantity of meat required by the troops during the period of the contract. Surely these circumstances furnish strong proof of errors in the accounts, and nothing has been offered to repel the presumption, that arises from them of manifest fraud. Between any parties such a case would require further examination, but this was a case of confidence, for the business was left to the management of Veyll only. Van Reenen never interfered; was never at the different places, where the business was carried on; he trusted entirely to the integrity of Veyll; and it is most probable that he never looked over the accounts. The action brought against himself and Veyll first opened his eyes. When Goetz recovered for profits, which Veyll had not accounted to him for, Van Reenen began to suspect that all was not quite right with regard to himself; but he did not act on suspicions, he proceeded with the caution of a fair and candid man. Having thought Veyll an honest man, and confided in him as such, he determined not to act hostilely towards him, until after a careful examination of the accounts he had become convinced of his dishonesty. This satis-

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factorily explains for his so long delaying to institute a suit to have the errors in those accounts corrected.

Veyll's conduct in this suit is decisive as to the question whether the accounts ought to be opened. Instead of appealing against the order of the Court that the accounts should be investigated, he agreed to submit them to arbitrators chosen by the parties. This is a consent to open the accounts, and they must therefore be submitted to a thorough examination. But, say the respondents, they have been examined by arbitrators, who have made their award, and that award being made under a rule of Court, is final, and cannot, by the Dutch law, be disturbed. An award regularly made cannot by the Dutch law, or our law, or any law, be disturbed, unless you can show improper conduct in the arbitrators; but in this case the authority of the arbitrators was determined by the death of Veyll before they had made their award. If men who submit to arbitration in the instrument of submission bind their representatives in a case where the action would survive to or against their representatives, although one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, and agreed, that those who take their property should take it subject to the decision of the arbitrators appointed. But if the representatives are not included in the reference, and one of the parties dies, that reference is determined. It has been argued that the ancestor and heir are identified, and that what binds one binds the other. If the ancestor binds the property, the heir must, in general, take it subject to the obligation which the ancestor has im-

posed on it. But this rule does not apply to arbitrations. A man who agrees to a reference may know, that he is capable of giving explanations, which his heir cannot give. He knows that, if his opponent be examined as a witness, he may be examined also. For these reasons he may agree to bind himself to submit to an arbitration, but not to bind those who are to succeed him. That this principle is founded in wisdom is proved from its having been adopted into the laws of England, Scotland*, Spain†, and into the Civil Law‡. We have been referred to no Dutch authority to show us that the law of Holland differs from the Civil Law, or that of other states which have adopted the Civil Law. The passage cited from Vanderlinden applies to actions in court, not to arbitrations. It seems that according to the law of France, Code de Procedure Civile, liv. 3, tit. unique, sec. 1013, an arbitration is not stopped by the death of one of the parties if his heir be of full age §; but I think a French jurist must have thought the reference could not have been continued in this case, where the heir was a married woman, the right of the husband to represent her was disputed, and the dispute in this point was kept up for nearly three years, during which time the arbitrators proceeded, attended only by one party. According to the Civil Law, if the heir of one party be named, and the heir of the other be not named, and

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* Erskine's Institutes, book 4, tit. 3, sec. 33.

† Johnson's Translation of the Principles of the Spanish Law, p. 295.

‡ Dig. lib. 4, tit. 8, l. 27; Domat. lib. 1, tit. 14, sec. 1, pt. 6.

§ See also as to the French law on Arbitrations, the Code de Commerce, liv. 1^{re}, tit. 3, sec. 2, Des contestations entre associés.

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either party dies, the reference is at an end. We therefore think that the judgment of the Court of Appeal, which is founded on the evidence of a void award, and the judgment of the Court of Justice, which, after the submission of the parties to arbitration treated the settlement between them as conclusive, must be set aside, and the cause sent back for the further examination of all the accounts.

To avoid sending the cause back to the Cape of Good Hope the parties agreed to refer the accounts to three merchants of London, and that judgment should be given according to their award by the Privy Council.

ON APPEAL FROM JERSEY.

CHARLES MARETT - - *Appellant.*

And

GEORGE JENNES - - *Respondent.*

26th June
1829.

THIS case originated in a suit instituted by the respondent, as the sole heir of Philip Jennes, deceased, in the Royal Court of Jersey, for the purpose of having an instrument (by which Philip Jennes had conveyed certain wheat-rents to the appellant,) cancelled and annulled, and the possession of these rents given up to him. The ground on which he impeached the validity of this instrument was, that Philip Jennes had died within three days after the execution of it, and that by the law of the island, not only all real property is incapable of being devised, but all conveyances of it made within forty days of the death of the vendor are void, and null, although they may have been made for a valuable consideration.

A purchase made within forty days of the death of the vendor, set aside by the heir of the vendor, such purchases being void by the law of Jersey.

The purchaser under such circumstances cannot call upon the heir to repay him the purchase-money, but must recover it as he can from the persons to whom it has been given by the deceased vendor.

The respondent proved the date of the execution of the deeds, and the death of Philip Jennes; and in support of his claim, he cited the decisions of the Royal Court of Jersey, in the cases of *Jennes v. Le Breton*, 5th of May 1826, and *Jennes v. Le Breton*, 15th of September 1824, in both of which he had been successful in establishing his rights against a Mr. Le Breton, who had obtained a lease of a house and garden, and the possession of some title-deeds and property from Philip Jennes six days before his death; and also the decisions

Semle, The receiver of the purchase-money ought to be made parties to a suit for the recovery of property sold under such circumstances.

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of the Royal Court, in questions of a similar nature, in *Payn v. Poulain*, 24th of September 1668; *Coutanche v. Laurens*, 16th of January 1695; *Ricard v. Durell*, 17th of January 1716, which was confirmed on appeal by the Privy Council, on the 26th of July 1720; *Bino v. Philippe*, 24th of September 1767; *Allez v. Deveulle*, 10th of October 1805; *Allez v. Collings*, 10th of October 1805; *Mourant v. Fauvel*, 8th of October 1812; and *Mourant v. Mourant*, 10th of November 1814.

The appellant did not dispute either the rule of law, or the fact of the instrument having been executed within three days of Philip Jennes's death, but he contended, that as he had actually paid 300 *l.* as a consideration for the purchase of the rent, he ought not to be obliged to give up the instrument of purchase to be cancelled without first having been repaid that sum by the respondent. Witnesses were produced to prove this payment, and it also appeared from their testimony that the original purchase-money, mentioned in the instrument, was 365 *l.*; of this 65 *l.* was retained by the appellant at the desire of Philip Jennes, in order to pay his debts and funeral expenses; and the remainder, directly it was received, was handed over by Philip Jennes to his attorney who had prepared the instrument, with directions to him to distribute it amongst several persons, some of whom were related to him and others not, in different proportions according to a memorandum which had been drawn up by the attorney from Philip's instructions the day before this transaction took place.

The Royal Court, on the 8th of June 1826, ordered the instrument or contract to be cancelled,

the respondent to be put in possession of the wheat-rent, and condemned the appellant in costs. From this decree the present appeal was instituted, on the ground that it did not (as it ought to have done) order the re-payment to the appellant of the 300*l.* he had actually paid for the rents.

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Rae, for the Appellant.

Knight, (K. C.) and *Pennington*, for the Respondent.

LORD WYNFORD:—

Neither real estates, or rents issuing out of such estates, are devisable by will by the laws of Jersey. If an estate be conveyed away in the lifetime of the party to whom it belonged, and he dies within forty days from the execution of the conveyance, the heir of the person conveying it may recover back the estate from the purchaser. This is admitted to be the law by the counsel for the appellants, and as Philip Jennes, the owner of the estate sold to the appellant, died within forty days from the date of the conveyance, they agree that the estate must be given up to the respondent, but they insist that he ought to repay to the appellant the purchase-money. If the respondent had received the purchase-money, he could not have been permitted to have the estate restored to him without refunding the price paid for it. The money paid by the appellant was distributed amongst several persons; indeed, it appears from the evidence, that Jennes, who died three days after the sale of the estate, was prevailed upon to sell it, in order to prevent his heir getting it in fraud of the law of the Island, which would not per-

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mit an heir to be disinherited in this manner. It was a conspiracy, and the appellant was a principal conspirator, and he must get back the money how he can, that he has paid to his co-conspirators. If we were to order the respondents to re-pay him, the object of the conspiracy would be accomplished. When there is no ground to impute fraud to any of the parties concerned, those who have received the purchase-money, and not the heir, who seeks to have his inheritance restored to him, are required to refund it to the purchaser when the seller has died within forty days of the sale. It is usual to make the receivers of the purchase-money parties to the suit for the recovery of the estate sold, and there are many * instances of judgments against the purchaser directing the restitution of the estate to the heir, and against those who have received the purchase-money, to restore it to the purchaser. One † of these judgments has been confirmed by his Majesty in Council, and is therefore of the highest authority. This appeal must be dismissed with costs.

* Coutanche v. Laurens, Ricard v. Durell, and Bino v. Philippe.

† Ricard v. Durell.

APPEAL FROM DEMERARA.

BENJAMIN FREYHAUS - - - *Appellant.*

And

STEPHEN CRAMER and GILLIS }
CANTZLAAR (executors of J. P. } *Respondents.*
Valz) - - - - - }30th June
1829.

J. P. Valz by his will, bearing date the 1st of May 1821, appointed the respondents his executors, and his aunt Boucher Des Forges his residuary legatee. He died on the 3d of December in the same year, and on the 4th the respondents took out an act in due form of law, by which they declared, that they thought proper to choose the right of deliberation on behalf of the heir, in order to ascertain the solvency or insolvency of the estate. The following day they caused an inventory to be taken of the property of the deceased, which was then valued at 237,975 guilders 10 stivers. The effect of the taking out an act of this kind is to protect the heir from the consequences of accepting the inheritance, which otherwise would, according to the rules of the Dutch law, make him liable to the payment of all the debts of the deceased owner of it*. The protection granted by the act extends for a year and six weeks from the time of taking it out. On the 30th of February 1823 the respondents presented a petition to the Court of Criminal and Civil Justice in the Colony, stating that the estate of Valz was

In a Colony governed by the Dutch law, executors who take no beneficial interest under a will do not, by entering into possession, or adiating the property of a testator, make themselves liable as heirs do to the payment of all his debts.

Paying for the schooling and maintenance of the illegitimate children of a testator, making small advances to their mother, and parting with a boat which was out of repair to the holder of an unpaid note of hand of the testator, originally given in payment for the boat, are not sufficient dealings with the estate to constitute an adiation.

* See Vanderlinden's Institutes, book 1, cap. 6, sec. 10, and book 3, part 1, cap. 7, sec. 1.; Van Leuween's Roman-Dutch Law, book 3, cap. 10.

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indebted about 130,000 guilders to the holders of a mortgage on his plantation, and about 40,000 guilders to other colonial creditors; and that if this plantation could be sold for its real value a sum of 66,975 guilders 10 stivers would remain to be divided amongst his heir and legatees, but if it was brought to a forced sale it would not bring the amount of the mortgage claim, and that they had not been able to make arrangements as they had wished with the mortgagees; they then prayed for an extension of the act of deliberation for six months. The court, after several interlocutory orders, granted, on the 25th of July in that year the prayer of their petition, by giving them six months further time. In July 1824 some of the creditors of Valz sued the estate, in consequence of which the respondents again applied to the Court and requested that curators should be appointed to it; this petition was referred by the Court to the appellant, who was one of the creditors, for his report thereon; he reported, that the executors had made themselves personally liable to pay Valz's debt, and that the prayer of the petition ought not to be granted. Notwithstanding this report, however, the Court appointed Messrs. Allan and Brode curators of the estate.

The appellant then commenced an action against the respondents for a debt of 6,000 guilders 15 stivers due to him from Valz, and contended that they had made themselves personally liable to pay it by having remained too long in possession of the estate, and by having paid some of Valz's debts and legacies. The evidence he produced in support of this claim proved, that the respondents had parted with a tent-boat belonging to Valz to the holder of

a note of hand, which Valz had originally given in payment for this boat, and that they had also paid some money for the schooling and maintenance of eight children, of whom Valz was the father by a woman of the name of Mary Semple, and had also at different times paid Mary Semple several sums of money. Both Mary Semple and her children were legatees under Valz's will, and the appellant insisted that these advances were made in part-payment of their legacies. The account books of Valz's estate were also produced to the Court, and several leaves appeared to have been cut out of one of them; and a clerk of the respondent Cramer deposed that he had destroyed original accounts or memoranda relating to it, because (as he alleged) it was the custom of Cramer to destroy such memoranda when the contents of them had been entered in the regular account-books.

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The cause came on to be heard on the 25th of November 1825, and the Court then rejected the appellant's claim, and condemned him to pay the costs of the suit. From this decision the present appeal was instituted.

Lushington, (Dr.) and *Henry*, for the Appellants, Contended that the respondents had committed three distinct *actes hereditaires*; they had paid a debt by giving the tent-boat for the unpaid note of hand; they had paid legacies by their advances to Mary Semple and her children on account of them; and they had remained in possession of Valz's property longer than by any construction of the law they could have been entitled to have done; they had therefore rendered themselves liable to the payment

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of Valz's debts. An heir who commits an *acte hereditaire* is bound by law for the payment of all the debts and charges on an estate, although they may exceed its value. Notwithstanding he may have taken out an act of deliberation, yet, if he alters or confounds the property of the testator, as by making payments, he commits an *acte hereditaire*. Vanderlinden's *Institutes*, book 1, cap. 9, sec. 10, p. 150. An executor must be considered as an heir, because he takes a beneficial interest by becoming entitled to 10 per cent. on all the property of the deceased by the laws of the colony. This doctrine had received the sanction of the Privy Council, who, in the cause of *Freyhaus* against the *Heirs of Forbes**, which was heard in 1827, had declared an executor to be liable to the claim of a creditor of the testator's estate, although he had obtained a decree of *perpetuum silentium* against the creditors, who had not come in and proved their debts before a certain time, which the respondents here had not done. They also referred to Potier *Traité des donations testamentaires*, cap. 5, sec. 1, art. 1, 2, 3, and Voet, *Comm. in Pan. lib. 28, tit. 8, de jure deliberandi*.

Adam, (K. C.) and *Stephen*, (Serjeant) for
 Respondents :—

If heirs commit an *acte hereditaire*, there is no doubt, but that they are liable to the payment of the testator's debts; that is not however the case with executors, who do not take a beneficial interest under the will. The respondents had not taken out the act of deliberation on behalf of themselves, but

* See note, p. 115, *infra*.

of the heir. Even, however, if executors were liable, as was contended for, the respondents had committed no acte hereditaire. Holding over the property after the time given for deliberation is not an act sufficient for that purpose, because adiation (*uditio in hereditatem*) is a question more of intention than action, Voet, *Comm. in Pan. lib. 29, tit. 2, sec. 5*. Paying childrens schooling, assisting their mother, and selling a boat, which otherwise would have decayed, to the injury of the claimants of the testator's estate, were no acts of adiation; they were acts of kindness, which might have been done by the respondents if they had had neither the name nor the right of representatives of Valz; every man, too, is presumed to act rather in his own name than in that of any other. Voet, *Comm. in Pand. d. det. sec. 7*. Heineccius says, *Elem. Jur. Civil. tit. 8, s. 71*, "pro hærede se gerere videtur, qui aliquid quasi hæres, et animo hæredis, nisi vel ex testatione vel aliis argumentis appareat, eum id non animo hæredis, sed pietatis, et custodiæ causâ fecisse." The two first of these acts would fall under the head of the "pietatis," the last under that of the "custodiæ."

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Lushington, in reply :—

The office of executors is of modern institution, and unknown to the old Civil Law. Nothing, indeed, is to be found respecting their liabilities in either Van Leuween or Vanderlinden, but it is of great importance to the Colony of Demerara, that they should be ascertained. It must be presumed that a possession which entitles them to 10 per cent. on the testator's property ought to make them subject to the same liabilities to his creditors as his

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heir. The acts of adiation cannot be denied. The advance of the legacies to Mary Semple and her children cannot be said to have been done *pietatis causâ*. That expression is used by the civilians to denote the taking care of the obsequies of the deceased. The selling of the tent-boat can still less be construed into an act done for the safe keeping of the property.

LORD WYNFORD (after stating the case):—

This case involves two questions: 1st. Whether an executor who takes no interest under the will is within the law that makes an heir liable to pay the full amount of the debts of the testator, if he takes on himself the administration of his property. 2dly, Whether what the respondents did can be held to be taking on themselves the administration of the property of the testator.

Vanderlinden, *book 1st, c. 6, sec. 10*, in his *Institutes of the Laws of Holland*, treating of executors, says nothing of their being liable *de bonis propriis*, if they once take on themselves the administration of the effects of the testator; but when he comes to speak of the heir he says, "The heir, by accepting the inheritance, cannot afterwards repudiate; and he becomes tacitly bound in law by this act for the payment of all the debts and charges on the estate, though they may exceed the value." I think we may collect from this writer, saying nothing as to the executors rendering themselves liable, and from his telling us, the moment that he speaks of the heir, that the heir having accepted the inheritance is liable to all the debts and charges, that an executor in trust

would not by acting as such incur this responsibility. An heir, under the laws of Justinian, might protect himself from incurring the liability of paying *de bonis propriis* by claiming the benefit of the inventory; and Voet, *lib. 28, tit. 8, s. 13*, says, “*Petunt, et impetrant hoc inventarii beneficium hæredes, sive ex testamento instituti, sive ex lege ad successionem vocati.*” This seems to extend the law which governs the cases of heirs to executors, but it must be understood that Voet is speaking of executors, who take a beneficial interest, and not of such as are only trustees for others. Such as take possession of an estate for profit may, without injustice, be made to incur the risk of loss, according to the maxim, “*Qui sequuntur commoda, iidem et incommoda sequuntur.*” But there is no pretence for saying that an executor, who from his regard for the testator, and for the compensation for his trouble, which the laws of many of the colonies have allowed him, takes upon himself the administration of the affairs of a deceased person shall be obliged to satisfy the claims on an insolvent estate.

The European nations who have adopted into their codes the principles of the civil law have made a great difference between an heir and an executor. In Scotland, the executor is only liable *secundum vires inventarii*, (that is, to the amount of the inventory; or estimate made of the property of the deceased,) but the heirs are liable in *solidum*, (*Lord Stair's Institutes, book 3, tit. 4, cap. 32,*) and the benefit of the inventory was first given to heirs in that country by an Act of Parliament*. In

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France* also the executors are only liable to the extent of the property of the testator that they possess themselves of. Potier, in speaking of the possession of the executor, *Traité des donations testamentaires*, cap. 5, art. 2nd, says, "L'executeur par cette saisine est constitué sequestre, il n'est en possession qu'au nomme de l'heritier." There he shows that the Civil Law with regard to heirs has no reference to executors in France, for he says, "Cette saisine des executeurs testamentaires est de droit contumier, et ne vient point du droit Romain." As there is no direct authority proving that the laws relative to heirs apply to executors in trust, we can have no difficulty in saying that we will not extend a law which is somewhat severe, even in cases of persons who take the benefit of the inheritance, to those who expect to derive no advantage from it; but we do not think, that the delay, which took place before curators were appointed, or the acts done by the respondents, would be sufficient to subject them to pay the debts, *de bonis propriis*, if the law relative to heirs applied to them. As to the delay, Voet, *Com. in Pan. lib. 28, tit. 8, sec. 1*, cites the authority of Faber, that, "Hodie jus deliberandi, nemine urgente totis viginti annis durare." There was no one who in this case called on the respondents to act, or apply for the appointment of curators. Instead of twenty years, there has been a delay of less than three. In the *Codex, lib. 6, tit. 30, de jure deliberandi, l. 19*, it is said, "Ideoque

† For the Law of France respecting executors see also the Code Civil, liv. 3, sec. 7; and the Code de Procedure Civile, liv. 2nd.

“ sancimus, si quis, vel a testamento, vel ab intestato
 “ vocatus deliberationem meruerit; vel si hoc qui-
 “ dem non fecerit, non tamen successioni renuncia-
 “ verit, ut ex hâc causâ deliberare videatur, sed nec
 “ aliquid gesserit, quod aditionem, vel pro hærede
 “ gestionem inducat, prædictum arbitrium in suc-
 “ cesionem suam transmittat.” This passage shows
 that it is not by any act, that the representative of
 the deceased may do, that he takes on himself the
 administration, but it must depend on the manner
 and circumstances under which the thing is done,
 whether it amounts to an acting as heir, or not.
 This too is the construction put on the law by the
 commentators; Voet says, “ An quis pro hærede se
 “ gessisset non tam facti, quam animi est,” *lib. 29,*
tit. 2, No. 5. Heineccius, *Elem. Ju. Civ. lib. 2, tit. 19,*
sect. 592, says, “ Adquirunt hæreditatem, vel
 “ expresse hanc voluntatem suam declarando, vel
 “ eandem tacite factis, et rê ipsâ significando;”
 again, *d. t. s. 59,* “ Is qui hæreditatem adiit cum
 “ legatariis, et fidei commissariis, quasi contraxisse
 “ censeatur.” According to these writers nothing
 is sufficient to constitute a person an acting heir, but
 that which amounts to an express, or implied con-
 tract on his part to take on himself this character;
 in the present case only three acts were done, one
 of these was for the preservation of the property,
 the two others from compassion to the children of
 the deceased, and their mother. These acts may
 make the respondents liable to answer to the cura-
 tors for the property thus disposed of, but it cannot
 (particularly as they had on behalf of the heir asked
 for the *jus deliberandi*) amount to proof of an in-

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tention to take on themselves the administration of the affairs of the deceased, and to subject themselves to the liability of all the consequences that might arise from it. *The case lately decided by this Board is not an authority for the appellants; there the executor had acted; he had paid some debts; but he had refused to pay what was due to the respondents, and the question was, whether he was bound to do so, or not.

The Court, which has appointed the curators, has also ordered an account to be taken of the estate. If the respondents have wasted, or misapplied any part of the property, or if the estate has been injured by their not having sooner administered it, those who take that account will take care that the respondents make good the loss. That is all that justice requires from them. There is no colour for saying that they ought to be obliged to pay all the debts, whatever may be their amount, and however unequal the estate of the deceased may be to the discharge of them. By the Scotch law, if a man acts as a vitious intromitter, that is, if without any pretence for acting as executor he takes upon himself the general disposition of the deceased's property, he must pay all his debts. Lord Stair, in his Institutes, says, "This is peculiar to this, and no other nation." I believe that learned writer is correct in that assertion. We know it is not the law of England, for an executor *de son tort* (although he without any pretence of authority interferes with the assets of a deceased person), is called upon, and is only answerable to creditors to the extent of property that has come to his hands. But the respondents were not vitious

intromitters; they were authorized to act by the will of Valz, and in such a case, even in Scotland, where the law is more severe against such persons than in any other country, they would only have been liable to the amount of the deceased's property. The action charging them *de bonis propriis* was properly dismissed in the Colonial Court, and the judgment of that Court must be confirmed, but as the respondents, or their clerks destroyed the account-books,

The appeal must be dismissed without costs.

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NOTE.

Freyhaus (executor of Henschelius) v. *the Heirs of Forbes*, by Teschemaker, their attorney, was a case heard on appeal before the Privy Council on the 9th of June 1827, and the 30th of January 1828. Henschelius was one of the executors of Forbes, to whom the respondents were heirs. Upon a settlement of the testamentary accounts in 1804, he undertook to collect a balance of 10,947 *gs.* 7 *st.* due to Forbes's estate for the respondents; he also, in his character of executor, received the sum of 5,860 *gs.* He died on the 4th of September 1814, without having accounted for or paid either of these sums. He appointed by his will the appellant and two others his executors. They caused all the creditors of his estate to be summoned by edict to appear and put in their claims against it, and on the 15th of October in that year they obtained a decree of *perpetuum silentium* against the non-appearers. They then proceeded to satisfy the claims of the creditors, who had filed their claims, and (as they alleged in their printed case) in so doing exhausted all the asset of Henschelius. The respondents did not appear,

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Perpetuum Si-
lentium against
the creditors
of a person
deceased, who
have not ap-
peared and
put in their
claims under
an *edictal* sum-
mons for that
purpose, is
not a bar to
the action of a
creditor who
has not so ap-
peared against
the executor
of such a per-
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or carry in any claim in obedience to the edict, but they privately made application to the appellant for the payment of the two sums of 10,947 *gs.* and 5,860 *gs.* In answer to one of these applications the appellant, on the 27th of May 1817, wrote a letter, in which, after begging the respondents not to have recourse to legal proceedings, he offered them, if they would deduct from their claim a certain per-centage to secure by a mortgage the payment of a sum thus reduced. This offer was refused by the respondents, and they commenced an action against the appellant in the month of May 1820 for the recovery of both the sums of money. The sentence of the Court of Criminal and Civil Justice condemned "the appellant to pay to the respondents the sum of 10,947 *gs.* 9 *st.*, being the amount of the remaining outstanding claims taken over by Henschelius and never accounted for, with interest on such sum or sums as had been received by Henschelius from the day of such receipt, or in case the claims were not collected, to account for the same in a regular and proper manner; and also to pay the respondents the sum of 58,460 *gs.*, being the balance due from Henschelius on monies actually received by him, with interest thereon, from the 26th of August 1817 until fully and finally paid, with condemnation of the appellant in costs." On the hearing of this appeal before the Privy Council on the 9th of June 1827, it was ordered that the printed cases of both appellant and respondent should be sent to Dr. C. M. Van Hall, at Amsterdam, for his opinion on these two questions. 1st. Whether, after the decree of *perpetuum silentium*, it was competent to the respondent, by the law of Holland, as administered at Demerara, and under the special circumstances of the case, and particularly the letter of the 27th of May 1817, to institute the proceedings in which the sentence appealed against was pronounced: 2ndly, Whether, under the circumstances appearing from the accompanying papers, and particularly from the appellant's letter of the 27th of May 1817, the Court was just-

tified, by the law of Holland as administered at Demerara, in pronouncing the sentence appealed against. The opinion of Dr. Van Hall was, upon the first question, that the *perpetuum silentium* adjudged on the 17th of October 1815, preceded by the citations by edict in the same year, did not afford sufficient grounds to quash in appeal the sentence of the 15th of September 1822. The reasons he assigned for this opinion were, that although such citations by edict might be usual in the Colony, yet by the old Dutch Law they would not have been binding in Holland, because a Judge would have no right to debar legal creditors from their unprescribed action by decreeing a *perpetuum silentium*; and although an action *ex lege diffamari*, called a "mandament to institute an action" was known in the old Dutch Law*, yet such an action could only have been had recourse to when it was proved that some one had instituted an action, to which he had no claim. In support of this opinion he referred to Voet in *Pand. lib. 5, ad tit. de Judiciis, No. 22*; and Vanderlinden, *Jud. Prak., 1st. vol. p. 244, et sequu.* On the second question, he thought that it might be inferred from the appellant's letter of the 27th of May, that the claims of the respondents were known to him, and that they were not therefore concluded by the terms of the order of *perpetuum silentium* as unknown creditors. The Privy Council, after hearing this opinion on the 30th of January 1828, dismissed the appeal with 150 *l.* costs. See also Voet in *Pand. lib. 4, tit. 6, No. 4*, and see generally, as to the practice with regard to decrees of *perpetuum silentium*, the Appendix to the Second Report of the Commissioners of Inquiry into the Administration of Criminal and Civil Justice in the West Indies, page 76. It is there stated, by the Colonial Secretary of Deme-

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* See Vanderlinden's Institutes, book 3, pt. 1, cap. 3, sec. 5, and Henry's Note thereupon, p. 426, of the Translation.

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rara, "That in cases of default parties have a right to
" proceed by way of relief against a decree of *per-*
" *petuum silentium*, and this is the reason why monies are
" paid out (of Court in cases of insolvent estates, and
" estates under an act of deliberation) *sub cautione de*
" *restituendo*."

ON APPEAL FROM THE CAPE OF GOOD HOPE.

FRANCIS BALSTON - - - *Appellant,*

And

WILLIAM WILBERFORCE BIRD *Respondent.**31st of May,
and 14th and
21st of June
1828.

THIS was an appeal from a sentence of the Court of Appeals in civil cases at the Cape of Good Hope, affirming a sentence of the Court of Justice in that Colony. These sentences were pronounced in an action brought by the appellant, who was the master of a ship called the *Lady Flora*, against the respondent, who was Comptroller of the Customs at the Cape, for damages occasioned by the detention of the ship under circumstances which are fully detailed in the judgment of the Master of the Rolls. The claim of the appellant was dismissed with costs in both of the courts below.

A voyage from Calcutta to Canton in ballast, and from thence to the Cape of Good Hope, under a license from the Governor-General of India, "to proceed in ballast from Calcutta to Canton, to there take in a cargo, and to deliver it on shore at Calcutta, or on shore at any intermediate port or ports in the course of the voyage, and not else-

Adam, and *Erskine* (K.'s C.) for the Appellant.
Lushington, (Dr.) and *Teed*, for the Respondent.

"where," is illegal, and cannot be justified under the terms of such a license.

Masters of ships trading "under the Act 54th Geo. 3, c. 34," between places within the East India Company's charter are bound to produce manifests in the form directed by the 53d Geo. 3, c. 155, and 27th Geo. 3, c. 52.

Semle, That the East India Company cannot grant a license to trade from Canton to the Cape of Good Hope.

* The editor having been kindly furnished by Mr. Teed with a note of the judgment of the Master of the Rolls in this case, has been induced, by the importance of the points decided in it, to insert it, although pronounced at a period anterior to that, at which these reports regularly commence.

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MASTER of the ROLLS :—

On the 10th of May 1820, the Marquis of Hastings, the then Governor-General of India, acting on behalf of the United Company of Merchants of England trading to the East Indies, granted a license to Mr. John Palmer, a gentleman resident at Calcutta, and who was the owner of the ship *Lady Flora*, for that ship to proceed on a voyage from Calcutta in ballast to Canton in China, and back to Calcutta ; and in a subsequent part of that license authority is given “to take on board at Canton, but “not elsewhere, tea not exceeding in quantity 500 “ chests, and to deliver on shore at Calcutta, or on “ shore in and at any intermediate port or ports in “ the course of the said voyage, and not elsewhere, “ all such teas, together with all other cargo which “ should be laden on board the said ship at the “ port of Canton aforesaid,” with the common exception with regard to opium. The ship accordingly proceeds to Canton ; no tea is taken on board under the authority of the license, but a cargo, or part of a cargo of a different description of goods is taken on board, and the ship sails from thence to Batavia, and there takes in other goods, and thence proceeds to the Cape of Good Hope. On the 20th of January the ship arrives in Table Bay, and two days afterwards, on the 22d, the captain makes a report of his arrival from Canton and Batavia at the Custom House, and applies for permission to enter, and land his cargo : he does not then produce his license, but he produces a manifest, or list of his cargo, signed by himself, and not authenticated by any other person. Upon the production of this paper, Mr. Bird, the respondent, the Comptroller

of the Customs, refuses permission to land the goods until he has an opportunity of communicating the circumstances to the Governor. On the 27th of January the captain of the *Lady Flora*, Mr. Balston, for the first time, produces the license; Mr. Bird still persists in his refusal. On the 29th, Mr. Luson, as the resident agent of the East India Company at the Cape, applies by letter to the Governor, submitting to him, whether he would allow the *Lady Flora* an entry under the license. On the 31st the Governor refers that letter to the Collector, and Comptroller of the Customs. It does not appear what report those officers made, but on the 1st of February they are directed by the Governor to proceed in this case, as the law directs. On the same day on which the Collector, and Comptroller receive this letter from the Governor, they write to him requesting to know, whether they are to take the opinion of his Majesty's Fiscal on the point at issue, and act in conformity thereto. The Governor answers that letter the same day, and states, that they are to take such steps, as they may judge most expedient, refusing to pledge himself to any opinion as to the legality of what may be done. On the 2d of February, however, the Governor (we must presume in consequence of a subsequent communication between him and the Collector, and Comptroller) writes to those officers, and approves of their consulting the Advocate Fiscal, and directs the Advocate Fiscal to give his opinion officially on the subject. On the 5th of February the Advocate Fiscal gives his opinion, that the voyage is illegal, and the ship subject to seizure. On the 9th Mr. Luson, the Agent of the East India

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Company, requests Mr. Bird to seize the vessel; and on the 10th Mr. Bird makes his seizure accordingly. A suit is immediately instituted by the Advocate Fiscal in the Court of Justice for the condemnation of the ship, and cargo, and on the 19th a sentence of restitution is pronounced. On the 21st, Luson and Bird give notice of appeal against the judgment, as far as respects the seizure of the ship. On the 22d, the Advocate Fiscal gives notice, that he shall appeal against the judgment pronounced, so far as it condemned the prosecutor in costs. On the 23d the Agent of the East India Company withdraws his appeal, and Mr. Bird also withdraws his. On the 27th the cargo is permitted to be landed. Upon a careful perusal of the papers their Lordships are of opinion, that although another manifest was produced, that purported to be from Batavia, all that the Comptroller appears to have done was to require, that the Captain should verify upon oath the manifest he had first delivered upon the 22d of January, and therefore that the cargo was permitted to be landed upon the same manifest, as it had been before refused.

In a very few days afterwards Captain Balston brings an action against Mr. Bird, not for the seizure, for he expressly disclaims by his demand, which is in the nature of a declaration, any right of action in respect of that, but he claims damages for the detention of the ship from the time, at which he insists, that the cargo ought to have been permitted to have been landed, namely, the 22d of January, until the day of the seizure; and he states in (what I term) his declaration, that "he is willing to allow, " that the personal liability of Mr. Bird ceased

“ during the period that he acted at the special instance of the Agent aforesaid,” and he also claims damages from the time the seizure was rejected, by the Court, till the time when the ship was actually permitted to land her cargo. A question has been made in the course of the argument, whether Mr. Bird can now be at liberty to enter into the question of the legality of the voyage, or whether he is not concluded by the sentence of the Court against the seizure pronounced on the suit instituted by the Fiscal. It does not appear on what grounds the Court below proceeded. Their sentence may be justified, either for want of jurisdiction, or for want of authority in Bird to seize. It would be against principle to conclude him by that sentence. If it had appeared that the Court below had proceeded upon the ground that the seizure was illegal, and the voyage legal, yet Mr. Bird ought not to be concluded by a sentence in an action to which he was no party, and in which he could not have interfered so as to make, what he might think, a sufficient defence. Their Lordships are therefore of opinion that Mr. Bird may defend himself both upon the grounds of the illegality of the voyage, and the want of a proper manifest.

It has been assumed in argument at the bar, with respect to the question of the legality of the voyage, that Mr. Palmer, being a merchant resident at Calcutta, was in that character, as he must reside under the license of the East India Company, entitled to trade within the limits of the East India Company's charter without any special license, and that in that respect he stood distinguished from His Majesty's subjects generally. We have before us the license

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under which Mr. Palmer resides at Calcutta. In that he covenants not to trade contrary to the Act of Parliament by which the East India Company have the exclusive right to trade. It does not appear from that, whether the practice which was insisted upon at the bar* prevailed in India at the time this license was given, or whether it was, or not a practice which, though not directly authorized by the Company, was indirectly recognized by them. If that were a point of importance in order to determine this case, there being a statement of two gentlemen at the bar, that such a practice did exist, their Lordships would have directed an inquiry upon the subject; but it is not material in this case, for whether Mr. Palmer had or not, either by direct, or indirect license, the privilege of trading with China in the manner he is asserted to have had at the bar, this particular voyage was made under a special license, and the question therefore, which the Court will now have to determine is, whether the voyage from Canton to the Cape of Good Hope was, or not, justified by the special license under which that voyage proceeded. The terms of that license are, "to deliver on shore, in and at the said port of Calcutta, or on shore, in or at any intermediate port or ports in the course of the said voyage, and not elsewhere, all such tea, together with all other cargo, which shall have been shipped or

* It was contended at the bar that Mr. Palmer, as a free merchant, was indirectly licensed to trade with China; and that it was the practice of free merchants at Calcutta to trade within the limits of the Company's charter, without any special license for the purpose, the license only being necessary in this case to enable the ship to take in tea.

“laden on board of the said ship at the port of Canton aforesaid;” and the question therefore upon the effect of this license is, whether it is possible to consider the Cape of Good Hope as an intermediate port in a voyage from Calcutta to Canton, and back again. Now, we are all perfectly acquainted with the relative situations of these places. The port of Canton in China is at comparatively an inconsiderable distance to the east of Calcutta, and the Cape of Good Hope is at a vast distance to the west and south-west of that port. It is impossible therefore to say, that in any latitude of construction the Cape of Good Hope is an intermediate port between Canton and Calcutta. Upon that ground alone, proceeding simply upon the language of the license, their Lordships are of opinion, that the voyage was illegal, and that the detention was justified by the circumstances.

There is another ground of objection, which has been suggested by one of the Members of this Court, who was long resident in the East Indies, and exercised a very high and important situation as Governor of one of the Presidencies, which has resulted from his own personal experience, namely, a doubt, whether the East India Company could have given a license in terms to proceed from Canton to the Cape of Good Hope, and whether, if it had been so granted in terms, it would have been a legal license. Now the terms of this license being “an intermediate port,” it must be intended that the Governor-General meant to grant a license to trade to ports which were within the limits of the East India Company’s charter. The Cape is not

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within those limits, although it is made specially so by the 54th Geo. 3, for the particular purposes of the circuitous country trade (as it is called), which is authorized by that Act. That Act authorizes all his Majesty's subjects to trade with the Cape of Good Hope, and any port within the limits of the East India Company's charter, as if the Cape of Good Hope had been within those limits. It is therefore for the purposes of that Act alone that the Cape is made within those limits. It would have been extremely questionable, whether the Company could have granted such a license; it is perfectly plain they did not mean to grant such a license. By the term "intermediate port" they had only in view those ports in their own limits, to which their license under such terms would be clearly considered as extending.

cap. 40, s. 1.

It is not necessary for the purposes of this case to enter upon the question, whether the manifest produced was sufficient; but as the Court has given great attention to the subject, it may be convenient to state the opinion of their Lordships. There is no general rule, as part of the law of nations, which prescribes the form in which manifests are to be made; but by the statute 26th Geo. 3, which was passed merely for the purpose of our own domestic trade, it is required that the manifest shall contain the name or names of the port or place where the cargo shall have been laden, the name and built of the ship, with the admeasurement and tonnage according to the register, the christian and surname of the master or other person having the command of the vessel, the name of the port or place to which

the vessel belongs, and an accurate account of all the cargo, and the marks and number of the packages ;” and this manifest is to be produced to the chief officer of the customs on clearing out, and to be indorsed and signed by him. It was found that the form of the manifest required by this Act could not be applied to the trade with the East Indies, since there was no custom-house officer there, who could authenticate it in the terms directed, and therefore the 27th of the late King provides, “ That in respect cap. 32, s. 11.

“ to ships despatched to any port, or place within
 “ the limits of the charters granted to the East
 “ India Company, the manifests mentioned in the
 “ 26th Geo. 3, shall be delivered to, and authenti-
 “ cated by the person who shall deliver the last
 “ despatches, who must be a servant of the Com-
 “ pany of not less than seven years standing, and
 “ for ships despatched from any port, or places in
 “ China by the Company’s supercargo there.” All
 this applies to the trade, which was at that time
 legal, that is, the trade of the United Kingdom
 proceeding to, or from a port of the United King-
 dom. By the 53d Geo. 3, the trade between the cap. 155.
 United Kingdom, and India is thrown open. It pro-
 vides that any of the King’s subjects may for the
 first time carry on a private trade within the limits
 of the East India Company proceeding from, or to
 a port of the United Kingdom. By the 14th sec-
 tion of that Act it is provided, “ That no ship or
 “ vessel engaged in private trade under the autho-
 “ rity of that Act should be admitted to entry at
 “ any port, or place within the United Kingdom, or
 “ the limits of the Company’s charter, until the
 “ Master, or other person having the command of

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“ such ship, or vessel, shall have made out, and exhibited a true, and perfect manifest of the cargo of such ship, or vessel, according to such form, and subject to such regulations, as were then, or thereafter might be prescribed by any Act, or Acts passed, or to be passed for that purpose.” These terms must of necessity have referred to the forms by the law then required, as to the trade, that was then carried on within those limits, and the manifest therefore, that is there required, must be a manifest with those particulars I have before referred to. At the time of the passing of the statute of the 53d of the late King it seems to have been doubted by the Legislature, whether it would not be proper to allow his Majesty’s subjects, thus permitted to carry on the private trade to and from the ports of the United Kingdom, to touch, and land their cargoes at an intermediate port; and it seems also to have been a question, whether it would, or not be prudent to give to his Majesty’s subjects generally authority to carry on trade, not merely within the limits of the charter, “to and from the ports of the United Kingdom,” but to carry it on generally within those limits, “although not proceeding to or from a port of the United Kingdom;” and inasmuch as no subsequent provision could be made without a breach of the contract with the East India Company, which was the effect of the statute of the 53rd of the late King; it is provided by the 20th section of that Act, “that nothing therein contained should extend to prevent the making during the further term thereby granted to the Company such further provisions by the authority of Parliament, as might from time to time be deemed

" necessary for enabling his Majesty's subjects to
 " carry on trade directly, or circuitously, as well be-
 " tween ports, and places situate without the limits
 " of the Company's charter, and all ports, and
 " places, except the dominions of the Emperor of
 " China situate within those limits, as between the
 " United Kingdom and India." In pursuance of
 this reservation, the 54th Geo. 3, passed, and that
 Act grants to all private traders from the ports of
 the United Kingdom to ports within the limits of
 the East India Company's charter the privilege of
 landing their cargoes at any intermediate ports, that
 had been contemplated at the time of passing the
 former Act, and liberty is given to all his Majesty's
 subjects generally to trade within the limits of the
 East India Company's charter. Nothing is said in
 this Act about manifests. The question therefore
 is, whether the trade thus authorized by the 54th
 Geo. 3, and thus contemplated by the 53rd Geo. 3,
 is not a trade, to which the Legislature meant to
 apply the necessity of having manifests according
 to the form prescribed by the statute 53rd, Geo. 3;
 and it is the opinion of their Lordships, that inas-
 much as this very trade so authorized by the 54th
 Geo. 3, was contemplated by the 53rd Geo. 3, and
 is so expressed in that statute, that the terms of the
 manifest required by the 53rd Geo. 3, are to be
 applied to the enlarged trade, which is authorized by
 the 54th Geo. 3.

If that be the case, the manifest of the ship Lady
 Flora, coming from Canton, ought to have been
 signed by the supercargo of the Company there,
 ought to have contained the built and tonnage of
 the ship, and the name of the port or place to which

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the ship belonged ; in all of which particulars the the manifest produced was defective. If it were now therefore necessary to decide this cause with respect to the construction of the Acts as to the form of the manifests, their Lordships would feel themselves obliged to come to the conclusion on the principles which I have stated, that under this manifest the voyage was illegal. The conduct of Mr. Bird, and indeed of all the officers, was perfectly justifiable ; and the Master, in being permitted to land his cargo, has met with an indulgence to which, clearly by law, he was not entitled.

The decree of the Court below must be affirmed, and the appeal dismissed, with costs.

A similar action had been instituted by the appellant in the court below against the Agent of the East India Company, on account of the part he took in the detention of the Lady Flora. This was also dismissed, with costs, by both the Court of Justice and the Court of Appeals in the Colony. An appeal was then instituted from these sentences to the King in Council, and it stood next in the paper to this ; but as the grounds upon which the decision in this case was given applied equally to the other, it was not argued, and was also dismissed, but, by the consent of the Mr. Serjeant Bosanquet, the Counsel for the East India Company, without costs.

ON APPEAL FROM ST. VINCENT'S.

RICHARD SAYERS - - *Appellant.*

And

GEORGE WHITFIELD - - *Respondent.*23d and 29th
July,
August 3d
1829.

THIS is the title of one of a series of no less than twelve appeals from different orders and decrees made by the Chancellor of St. Vincent's in the course of the proceedings in one suit*, instituted by the respondents against the appellants, who were mortgagees, and judgment-creditors of two plantations in that island, for the purpose of setting aside a sale under certain executions, by which they had become purchasers of the mortgaged property, and also for the purpose of having some of the mortgage securities themselves declared usurious, and vacated accordingly. These appeals principally related to questions of account between the parties, and embraced no matter of general, or legal interest; some of them were decided on the hearing by the Court, but the greater part of them were referred to the arbitration of Mr. Burge†. The two questions of the greatest importance that were decided by the Court were, 1st, As to the legality of a covenant in one of the mortgages to consign the produce of the

A covenant in a mortgage of property in the West Indies to consign the produce of the mortgaged estate to the mortgagee is not usurious.

A mortgagee in possession is entitled to the benefit of this covenant, and may charge commission on the sale of the produce of the mortgaged estate.

On the assignment by a mortgagee in possession, those supplies and contingences, which were due before the assignment being paid by the assignee, may be added to the mortgage-debt, and charged against the mortgaged premises.

* It is the practice in the island of St. Vincent's to prosecute an interlocutory decree, notwithstanding it has been appealed against to the Privy Council, on the party, in whose favour it has been made, giving security to indemnify the other party in case it should be reversed.

† To the kindness of his friend, Wm. Burge, Esq., late Attorney-General of Jamaica, the reporter is indebted for a note of this case.

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mortgaged property to the mortgagees, and of their charges for commission upon such consignment. 2nd, As to the power of mortgagees in possession to charge against the estate the amount of the money, which they had paid for supplies, and contingences furnished to it, before they had entered into possession. These two questions were argued separately. The facts, upon which the first question arose are as follow :

Andrew Ross and John Kean, by indentures of lease and release, of the 30th of June and 1st of July 1802, mortgaged two plantations belonging to them, called Henry's Vale, and Peruvian Vale, with the slaves and stock thereon, to Thomas Hammond, as a security for the re-payment to him of 15,000 £., which he had then already advanced, and such further sums as he might thereafter advance to them, with interest thereon at the rate of 6 per cent. per annum. In this mortgage there was a proviso for redemption of the premises by Ross and Kean, or one of them, their or either of their heirs, executors, administrators or assigns, on payment of the 15,000 £. and interest at different stated periods, the last of which was the 1st of August 1807, and of any further sums, which Hammond might advance within one month after demand made in the manner therein mentioned. There was also a covenant from the mortgagees to pay in the usual form, and a further covenant in these words, " That they, the said Andrew Ross and John Kean, their heirs or assigns, or some or one of them, shall and will, yearly and in every year after the date of these presents, until the said sum of 15,000 £., and all future advances to be made by the said Thomas Hammond, as is hereinbefore mentioned, with interest on the same,

“ shall be fully paid and satisfied, ship and con-
 “ sign, or cause to be shipped and consigned, unto
 “ Messrs. Richard and John Sayers, in Dublin, or to
 “ such other person or persons as the said Thomas
 “ Hammond, or his legal representatives, shall nomi-
 “ nate or appoint, all the crops of sugar, that shall
 “ be manufactured, or made upon the said two
 “ several mortgaged plantations and premises, to
 “ be sold on commission for, or on account of the
 “ said Andrew Ross and John Kean; and will
 “ ship such sugars in such vessels, as the said
 “ Thomas Hammond, or his representatives in that
 “ behalf shall direct or require; and shall and will
 “ take and receive from the said Thomas Hammond,
 “ or his attorney, or agent, all such plantation stores
 “ as they the said A. Ross and John Kean may
 “ want for the use, and supply of the said mort-
 “ gaged premises.”

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The Sayers were merchants in Dublin, in partnership with a gentleman of the name of Gordon, and the 15,000 *l.* was money belonging to the partnership. Hammond was only a trustee for them, and they required him in 1803 to transfer the mortgage to them accordingly by indentures of lease and release, of the 24th and 25th of March 1803, to which Hammond was a party of the first part, Ross and Ann, his wife, and Kean, of the second part, and Sayers and Gordon of the third part, Hammond conveyed, and Ross and Kean confirmed the mortgaged property to Sayers, Gordon and Sayers, subject to the proviso for redemption contained in the former mortgaged deed.

At the time of the execution of the mortgage to Hammond a moiety of the Peruvian Vale and the

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whole of the Henry's Vale estates were subject to a prior mortgage to Messrs. Mannings and Co. ; the other moiety of the Peruvian Vale estate was also subject to a prior mortgage to Messrs. Slater and Robinson. The Sayers and Gordon, in the year 1807, purchased the interests both of the Messrs. Manning, and Messrs. Slater and Robinson. Their mortgages were transferred to trustees in trust for the Sayers and Gordon. These prior mortgagees had previously obtained possession of the estates comprised in their mortgages, and in the month of May 1807 their agents gave them up to Gordon, who acted for the Sayers and himself. In October in the same year Sayers and Gordon brought the mortgaged estates to a sale, and obtained a conveyance of them to themselves in fee from the Provost Marshal-General of the Island. Under this conveyance, they remained in possession of them till 1814. On the 14th of April in that year the respondent and others, as the real and personal representatives of Ross, who had before his death become entitled to the equity of redemption of the whole of the mortgaged property, filed a bill in the Court of Chancery in St. Vincent's against the appellant Sayers, his partners and others, for the purposes. which have before been mentioned, and thus commenced the suit that gave occasion to this series of appeals.

The appellant and the other defendants put in their answers to this bill, and various proceedings were taken in the suit; and on the 29th of May 1816, a decree was pronounced in it, by which the sale and conveyance by the Provost Marshal-General was declared illegal, and set aside ; and a reference

was directed to the Master to inquire into all the accounts between the parties. From this decree Sayers and Gordon appealed to the Privy Council, who, however, confirmed it, so far as it related to the setting aside the sale, and conveyance from the Provost Marshal-General, but made some alterations in it, as to the accounts directed to be taken. In the mean while the Master proceeded to take the accounts, as directed by the decree of the Court below. On the same day, that he made his report, the Chancellor of St. Vincent's, on the petition of the respondent Whitfield, directed several issues to be sent to be tried at common law. One of these issues was to try, "whether the commissions on the consignments of sugars, that were stipulated, and reserved by the deeds of the 30th of June, and 31st of July 1802, to be made to Sayers and Gordon by the said Ross and Kean, were *bond fide* intended, as a remuneration to the mortgagees for selling those sugars, or as a colour for taking more than the lawful interest on the loan thereby secured." Another was to try, "whether the proviso, or covenant inserted in those deeds, that Ross and Kean should purchase all the colonial supplies for the estates mentioned in those deeds of Hammond, the mortgagee, until the whole of the mortgaged debt was paid, was a fair and customary stipulation, or a colour for taking more than the lawful interest thereby secured."

These issues were tried by a special Jury on the 19th of May 1818. The appellants made default, and did not appear. The Jury however found, upon the evidence produced by the respondent on the first issue, that the commissions on the consignments

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actually received and sold were *bond fide* intended as a remuneration for the sale of such sugars, and all commissions, and other charges on sugars not received were a colour for taking more than the lawful interest on the loan secured by the mortgage-deeds; on the other issue, that the covenant that Ross and Kean should purchase all the colonial supplies from the mortgagor until the whole of the mortgage-debt was paid off was not a fair, or customary stipulation, but was a colour for taking more than the lawful interest on the loan secured by those deeds.

On the cause coming on to be heard, after the trial of these issues on the equity reserved on the 18th of June 1818, the Chancellor pronounced his decree, that the deeds should be declared usurious. Exceptions were then taken by both parties to the Master's report, and it was in the shape of an appeal from a decree overruling one of these exceptions by the appellant to the allowance of commission, freight, and incidental expenses on all sugars sold by Sayers and Gordon, on the ground of the usurious nature of Hammond's mortgage; that the first question as to the legality of the covenant for consignments, and freight, and the power of the mortgagee to charge commission on such consignments, came before the Privy Council.

The Board intimated it to be their opinion, at the commencement of the argument, that as the mortgagees had actually paid the freight themselves they were entitled to charge for what they had paid, and therefore the question of the legality of the charges for freight was not argued by the Counsel for the respondent.

Horne, (K. C.) and *Garratt*, for the Appellants, relied upon the authority of *Bunbury v. Winter*, 1 Jac. & Walker, 255, that a mortgagee lending money upon the security of an estate in the West Indies is allowed the benefit of a covenant for the consignment.

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Ross, for the Respondents :—

Bunbury v. Winter was not the case of a mortgagee in possession, as the present is, but of persons taking a covenant to consign the produce of a plantation to them, as a remuneration for their becoming securities to Government to a very large amount for the proprietor of it. *Chambers v. Goldwin*, 9 Ves. 254, was however a case like the present, of a mortgagee in possession, and there Lord Eldon decided, that a mortgagee could not stipulate for any advantage beyond the interest of his mortgage, and could only charge for such commission as he had himself actually paid. The appellant is not entitled to charge for a single farthing beyond what he, and his partners have actually disbursed. It is not pretended that they have paid any commission to third persons, and they can not be permitted to claim it on the ground, that another consignee must have been found, and would have been entitled to his commission, if they had not acted in that character themselves. In *Langstaff v. Fenwick*, 10 Vesey, 405, the Master of the Rolls would not allow a mortgagee to charge commission, as a receiver, although if he had not acted as such, some other person must have been appointed for that purpose. The same principle applied to a mortgagee acting, as consignee, as to a mortgagee acting, as a receiver. The appel-

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lant can not therefore be entitled to any charge for commission from the year 1807, when he and his partners obtained possession of the property, to the year 1815. Independently however of this argument, which does not affect the prior years from 1802 to 1807, these mortgages have been declared void in the Court below, on the ground of usury in the covenant to purchase the plantation-stores of the mortgagees ; for even if the covenant for commission was legal, yet coupled with the other covenant it can not be supported. If then the mortgages are declared to be usurious, the appellant can not, from the beginning in 1802, be considered as entitled to the benefit of any of the covenants contained in them. These covenants, too, were most oppressive in their effects, as they obliged the owner of the plantation to consign his sugars to Dublin, where they were sold at a far less price, than they would have been, had they been consigned to London.

Lord WYNFORD:—

If we were to admit that this covenant in the deeds is tainted with usury, still we should be bound to say, that the Master has done right in allowing the freight, and other charges incidental to the conveyance of the produce of the estates to Europe, which the consignees have paid to other persons. Although the deed may be void on account of usury, yet if you apply to a Court of Equity to be relieved from it, you must do equity ; and what pretence is there for saying, that although the consignors have the right of having their sugars and rums carried to market, they are not to allow in

account to the consignees the monies, which they have expended in the transport of them. The rule of equity is, that the borrower is to be relieved from all excess above legal interest, in whatsoever shape the excessive charge may be attempted to be imposed on him, and from nothing more. Money actually disbursed by the consignees for the benefit of the consignors cannot be converted into charges made by the consignees for the purpose of obtaining illegal interest. If the Court rejected such charges, it would go beyond the bounds of redress, and would inflict punishment. This a Court of Equity never does. With respect to the commission, which the consignees have charged for their own labour in selling the proceeds, I at first thought, that as the jury on the trial of an issue in the island had found, that it was usual for mortgagees to stipulate that the consignments of the produce of the mortgaged estates should be made to themselves, and that such consignees might charge a reasonable commission on the sale, and that the commission charged in the present case was a reasonable commission, there could be no objection to this charge. The finding of the jury had, as I thought, purified the case from all taint of usury. Afterwards I found the cases of *Chambers v. Goldwin*, 9 Vesey, 271, and *Langstaff v. Fenwick*, 10 Vesey, 405. From these cases I learnt, that charges which had a tendency to usury should be disallowed in account. The great respect I feel for Lord Eldon and Sir William Grant, who decided these cases, made me doubt whether the view, which I had taken of the present was correct, and I recommended this Board to pause before it pronounced any opinion. We have since fully

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considered this question, and now think, that any further pause might excite alarms, which might be injurious both to the West Indian merchants and planters. For my own part, I am satisfied that I am not influenced by any partiality for my own first impressions, when I concur in the judgment, which I am about to pronounce, that there is no objection to the charge for reasonable commission in this case.

The authority of former decisions is in favour of such a judgment. The cases to which I have already referred related to receivers, between whom, and consignees there is a material distinction. A mortgagee has a right to take possession of the mortgaged estates. If you allow him to convert himself into a receiver, and charge fees as such, you will tempt him to take possession of them, when possession is not necessary for his security, and thus occasion great embarrassment to the mortgagor, and injury to the property in mortgage. The practice of a mortgagee in possession charging fees as a receiver, although he receives the profits for the liquidation of his debt, would, according to the language of the cases referred to, have such a tendency to usury, that the general rule of Courts of Equity should be not to allow such a charge. To this rule there may be exceptions, but it will be for those who wish to exempt themselves from the rule, clearly to prove their grounds of exemption.

These cases therefore are not applicable to the present; but we find in *Bunbury v. Winter*, 1 Jac. & Walk. 257. 261, the right of a mortgagee to stipulate, that the produce of a West Indian estate should be consigned to him, and of charging commission

on the sales of such produce, expressly established. Mr. Ross has endeavoured to distinguish that case from the present by the circumstance of the mortgagee in that case not being in possession, and in this case of his being in possession. I cannot consider that circumstance as establishing any rational distinction, because a mortgagee out of possession may put himself in just when he pleases; and therefore there seems to me to be no reasonable ground to say, that there can be a difference between the one case and the other. But there is also another case, *ex parte the Assignees of Meek and another in the matter of Strickland v. Brickwood**, which bears strongly on this point. The note which I have of this case seems to have been taken with accuracy, but as I do not know the note-taker I do not much rely on

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* The note of this case which was handed to the Court, was the following: Court of Chancery, August 20th, 1814 *ex parte the assignees of Meek and another in the matter of Strickland v. Brickwood*.

This was a petition in bankruptcy, which involved the question, whether it was usurious for a merchant to advance money to another on a commercial speculation in consideration of having, besides the usual interest of 5 per cent, the cargo of a ship consigned to him, and charging upon the sale, in addition to brokerage, a commission for himself, called a mercantile commission.

It was insisted by Sir S. Romilly, that to advance money upon interest, at the same time stipulating for other advantages, gave the transaction an usurious taint, and that a demand so infected with usury could not be proved under a commission of Bankruptcy.

The Lord Chancellor was of opinion, that what was denominated a mercantile commission was a usual commission, in no respect falling within the scope of the laws enacted to prevent usury.

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1 Jacob and
 Walker, 167.

it. We have however one recent decision directly to the point in question, and the cases, which induce us to doubt, are distinguishable from the present. We say therefore, on the authority of previous adjudications, that this charge for commission should be allowed. If indeed a mortgagee stipulates for charges, more than the usual commission, or more than the mortgagor can prove, he could get his produce equally well sold and accounted for ; and that he has given notice to that effect to the mortgagee ; we do not think more should be allowed to the mortgagee, than the mortgagor would have paid to any other safe, and respectable consignee, but considering the practice on principle with this check, which we have thought it right to say, should be imposed on it, it cannot be either usurious in itself, or have any tendency to usury, oppression or improper charges. Against these we hold it to be the duty of Courts of Equity to protect debtors. We know from the inquiries which we have made, and from the authority of Lord Eldon, that this is the known mode of dealing between planters and merchants. The putting a stop to an established practice often produces a mischievous derangement of business. A decision having that effect should never be made, unless the evil arising from such a practice greatly counterbalances the good. This practice is beneficial to the mortgagee, inasmuch as he derives from it the security of the produce, and the power of applying the proceeds in liquidation of his debt. It is more ; it is beneficial to the mortgagor, who, when his produce is consigned to his creditor, is certain of getting its value. In the event of the bankruptcy of the mortgagee, his debt will be awarded to him

under that clause of the bankrupt laws, 6 Geo. IV. c. 16, s. 50, which allows mutual debts, and credits to be justly set off, one against the other, and he will not be obliged to come in under the commission, and be contented with his dividend with the other creditors. If his produce were consigned to one, who was not his creditor, he might in the event of the failure of his consignee lose the whole, or a considerable part of it, for there would be no debt against which it could be set off. According to this practice his property is always secure; if the practice be departed from, he is always in some degree of danger. It is desired too by all persons, that their pecuniary wants should not be disclosed to the world. The pecuniary wants of a planter must soon be known by his consignee; if those wants are not to be supplied by the consignee, but by some other person, his credit must be exposed to several, instead of the knowledge of his difficulties being confined to one, who is interested in keeping them as secret as possible. The uncertainty of the returns of West Indian property makes planters particularly liable to sudden pecuniary distress. There are no persons, to whom they can have so ready a recourse, as to their consignees, who (I am confident, from the high character of British West Indian merchants) will always be disposed to give the most prompt, and liberal assistance, that the circumstances of the planter will justify them in affording.

It has been said in argument, that the covenant to consign to the mortgagees has in this case obliged the mortgagors to send their sugars to Dublin, when it would have been more to their advantage to have sent them to London. In all these cases the produce

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must be required to be sent, where the mortgages resides, otherwise he can have no security from it. If planters prefer the English to the Irish market, they must borrow what they want from Englishmen.

There is no reason why this Court should adopt any measures which would have the effect of placing our Colonial possessions in greater embarrassments, than those, under which they at present unfortunately labour. It would be the duty of this, and every other court, as far as it could, to afford assistance to these valuable appendages to the British Crown. They have difficulties enough to contend with. This court would add to these difficulties, if it put an end to a practice sanctioned by long usage, and which, in the view we take of it, is a practice as advantageous to the planter, as it is to the merchant. If it were interrupted too, it might prevent capitalists from lending their money in the British West Indies, and so deprive our own possessions of the advantage, which they now hold over the colonies of all other European nations, in having the aid of the greatest capitalists in the world to enable them to cultivate their estates. This would be a great public injury, because it might both prevent capital from being beneficially employed, and deprive one of the most productive branches of industry of the necessary means of support. After, therefore, the most serious consideration, we are of opinion that the charge of commission should be allowed.

The next question of importance in this case arose under these circumstances. Sayers and Gor-

don, after they had taken possession of the mortgaged property, had paid for the supplies and contingences of it during the time it was in their hands, and the Master had allowed the amount of what they had so paid, as charges against the estate in his report. They had also paid several sums for some of the supplies, and contingences which had been furnished to the plantation during the time it was in the possession of the prior mortgagees, but which had not been paid for by them. The amount of those latter payments the Master refused to allow to be charged against the estate, and the appellant Sayers excepted to this report, because they were not allowed. The case came on before the Privy Council, on appeal from the decree confirming the Master's report.

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Horne, and *Garratt*, cited *Scott v. Nesbitt* as an authority to prove, that it was the custom in the West Indies to allow such charges for necessary expenses against the estate. 14 Ves. jun.,
p. 438.

Ross contended that there was no law in St. Vincent's that obliged a mortgagee to pay for supplies furnished to the mortgaged estate previously to his taking possession of it, and to prove that he produced the collection of the statutes of St. Vincent—

[*Lord Wynford* :—The question was as to the custom, and not as to the statutes of the Island.]

—No such custom was known there. Mortgagees were under no obligation, either legal, or equitable, to discharge debts incurred on such an account, which could only be held to be mere simple-contract debts. If however they did discharge them, they acquired no lien by that means on the

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estate, or right to charge, what they had paid, against it. The Master had reported against this charge, and, indeed, although there was proof, that Sayers, and Gordon had paid for the supplies, yet there was no proof, that the supplies had ever been actually furnished.

Lord WYNFORD :—

The Master has not reported to the Court, whether there is any custom in the Island of St. Vincent's, which gives to a person who furnishes supplies necessary for the management of an estate in that Island, a claim against the estate for the price of such supplies. We have reason to think, that such a custom prevails in most of the Islands in the West Indies. The existence or non-existence of such a custom is a question of fact, on which we cannot decide. But before we disallowed this claim, we should have felt it our duty to address his Majesty to send back the case to the Master, with directions to inquire whether there were any such custom in St. Vincent's.

But the common law of England is the common law of St. Vincent's, and thus the rules which regulate our Equity Courts regulate also the Court of Equity in that Island. We think it therefore not necessary to send this case back to the Master to inquire, as to the customs respecting charges on estates for supplies, because the respondents would, according to the practice of our Courts of Equity, have been entitled to charge the estates for supplies necessary for its management. The right of lien, or of holding property, as a security for what is done for its preservation, or improvement, is in

England generally confined to personal property. If a man repairs a house, he must take care to get paid by the person, who employs him. If he were permitted to charge the estate with his debt, he might throw on a reversioner or remainder-man, those repairs which tenants for life are bound from time to time to do, in order to keep the estate in a proper condition. If the person, who requires the repairs be tenant in fee, the person repairing wants no lien, as he may by a judgment of a court of law get the estate. Our law, therefore, is established with a proper regard to the right of the tradesman, and of all persons who have any interest in the estate repaired, or improved. But there are estates in England, the produce of which cannot be brought to market without the aid of expensive perishable works.

This is the case with alum-works and coalmines. It has been decided, that in accounts to be taken between different tenants of such estates, whatever one has furnished for the carrying on the works, shall be allowed, as a charge against the estate. Lord Eldon extended the rule that governs the taking of the accounts of such estates to the accounts of a consignee of a West Indian property. If the slaves on these estates are not furnished with the necessaries of life, if the works are not kept in order, or to use a comprehensive term familiar to colonists, the necessary supplies and contingences are not provided, the plantation must be ruined, for it is only by means of these that it is made productive, and derives its value. The land is worth little without the means of cultivating it, and fitting its produce for the market. Free la-

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bourers cannot be hired: either a stock of slaves must be kept up, or the land must remain uncultivated, and unproductive. When the crop is taken from the land, it requires mills to get the sugar from the canes, and all the implements of a distillery to produce the rum. The management of such property is more like that of a manufactory, than of a farm in England. The slaves and machinery may be easily removed, and as they constitute the principal part of the value of the estate, the person, who furnishes supplies, has not the same security, as a man who trusts to the owner of an English estate, which cannot be taken away out of the reach of the execution of the creditor. The interest of all, who have any concern in West Indian estates, and, what is more important, humanity to the slaves, makes it expedient that those, who furnish supplies, should be able to charge the amount of those supplies against the estate. The Master has in this case allowed such charges for the one period, but has not allowed them for another. This conclusion appears to us extraordinary, and we are of opinion, that the whole of these charges ought to be admitted.

END OF PART I.

C A S E S

ARGUED AND DETERMINED

BEFORE THE

LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM BERBICE.

J. G. CLOOT DE NIEUWERKERK - *Appellant.*

And

WILLIAM REYNOLDS, who had died since entry of the appeal, and SA- MUEL FIREBRACE, who had been appointed in his stead	}	<i>Respondents.</i>
- -		

JAMES FRASER, a merchant and planter of Berbice, by his will appointed Jacob Van Imbyze Van Batenburg (then governor of the colony), John Ross, then an inhabitant of the same place, John Anderson, of London, merchant, and his (the testator's) wife, to be his executors and executrix. On the death of the testator, in the year 1800, his two executors, resident in Berbice, viz. Van Batenburg and Ross, took charge of his estate there, and continued in the administration of it until 1805, when Van Batenburg was, at his own request, released by the Court of Justice from his office of executor, and Layfield was appointed in his stead. About the same time the Court appointed William Munro, and another person who declined to act, guardians of the testator's minor children; and his widow hav-

A mandament of Penal Interdict ought not to be granted to restrain the execution of a sentence upon grounds that might have been brought forward at the hearing of the cause.

In an appeal against the execution of a sentence the appellant cannot enter into its merits.

By such an appeal the justice of the original sentence is admitted

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ing returned with Archibald Stewart, whom she had taken as her second husband, to the colony, Stewart and Munro obtained possession of the testator's property from Ross and Layfield.

In the year 1806 Van Batenburg died, having appointed Sigismund Humbert and William Threlfall his executors.

Appointment
 of Katz and
 M'Cammon
 as sequestra-
 tors of Fraser's
 estate.

On the 29th of January 1807, the Court of Justice, on the petition of Stewart, appointed Wolfert Katz and John M'Cammon, as intermediate sequestrators, to take upon themselves in the place of Ross and Layfield the administration of the testator Fraser's estate, and to collect, together with Stewart, the outstanding debts, with interdiction to Ross and Layfield to commit any further acts of executorship or administration over the estate of the said testator.

Death of Ross
 and appoint-
 ment of J. Fra-
 ser and Fair-
 bairn in stead
 of Katz and
 M'Cammon.

After the making of this order Ross died, leaving Layfield and one Robert Douglas his executors, and on the 7th of December 1807, the Court of Justice dismissed Katz and M'Cammon, on their own petition, from their office of sequestrators, and appointed James Fraser and Peter Fairbairn in their stead.

Suit by the
 guardians of
 Fraser's chil-
 dren against
 the representa-
 tives of Van
 Batenburg and
 Ross, and
 judgment.

In the year 1808, Munro and Stewart instituted an action against Humbert and Threlfall, as the executors of Van Batenburg, and Layfield and Douglas, as the executors of Ross, to compel them to pay certain sums which they alleged to be due from the estate of Van Batenburg and Ross to the estate of the testator Fraser; and after various proceedings in the action, the Court of Justice, on the 16th of December 1809, pronounced a definitive sentence thereon, and thereby adjudged and decreed

that various disputed items in Van Batenburg's and Ross's accounts therein mentioned should be chargeable on their respective estates; and from the accounts made out in pursuance of this sentence, the effect of it appears to have been to charge the estate of Van Batenburg with the payment of the sum of 6,151*g.* 4*s.* 14*p.* and the estate of Ross with the payment of a sum exceeding 20,000 guilders.

Fairbairn afterwards died, and the Court on the 15th of July 1822, appointed the respondent, William Reynolds, to be sequestrator of Fraser's estate, in his place; and he soon afterwards made out and delivered an account to the appellant and a person of the name of Cameron, who had then become the representatives of Van Batenburg, in which he charged them, together with the representatives of Ross, with the sum of 55,758*g.* 14*s.* 8*p.*, being the amount of the whole of the sums which had been charged by the sentence of the 16th of December 1809, on both the estates of Van Batenburg and Ross, together with interest thereon from that time at 6 per cent.

The appellant and Cameron having refused payment of this demand, the respondent, on the 5th of October 1822, caused his declaration and demand, together with copies of the last-mentioned account and the sentence of the 16th of December 1809, to be filed, and served on the appellant and Cameron and the representatives of Ross; he thereby demanded "that they should be condemned to pay jointly and severally to him, on receipt of due acquittal, if need be, on the records of the colony, as also under due release and discharge, if need, with cession of action to one of the defendants paying, against the others of the said defendants, in

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Appointment
of respondent
as sequestra-
tor of Fraser's
estate instead
of Fairbairn.

Institution of
suit by him
against the ap-
pellant and
Cameron as
representa-
tives of Van
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and the repre-
sentatives of
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" default of paying, if need be, also to be executed
 " in the registry of the said Court, the capital sum
 " of 28,366 *g.* 16 *s.* 4 *p.*, with interest, as calculated
 " in the account thereto annexed, on the said
 " capital, until the whole should be fully and
 " effectually paid off, under deduction nevertheless
 " of whatever sum or sums the defendants could
 " prove to have paid thereon, or ought to be
 " admitted as a part thereof, with corresponding
 " interest, making an express demand of costs of
 " suit," &c.

Representa-
 tives of Ross
 discharged
 from the
 action.

On the 23d of January 1823, Robert Douglas and John Cheney, who were at that time the representatives of Ross, having alleged that his estate had long since been utterly closed and insolvent, were released by the Court from all participation in the cause, so that the liability for the whole sum was thrown on the appellant and Cameron, as representatives of the estate of Van Batenburg.

Pleas of appel-
 lant.

The appellant having filed an extract from the minutes of the court of the 7th of December 1807; set up, under reservation of all other pleas and defence which might thereafter be maintained if necessary; the plea of *non qualificatie**, as also the plea of " tibi adversus me non competit hæc actio," and answering subordinately and only in case the said exception should not be allowed, concluded to a rejection of the demand cum expensis.

Reply by re-
 spondent.

The respondent in his reply denied the validity of these exceptions, and further insisted that if they were valid they did not warrant the appellant's conclusion and answer, because such exceptions only warranted an absolution from the in-

* See Vanderlinden's Instit., book 3, part 1, cap. 2, sec. 15.

stance, and not a rejection of the plaintiff's demand ; and he for this and other reasons rejected the exceptions, conclusion and answer of the appellants, and persisted for reply according to the tenor of his declaration and demand.

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The Court rejected the appellant's exception of *non qualificatie*, and ordered the parties to proceed.

Appellant's
plea rejected
by Court be-
low.

The appellant then demanded admittance and a sight of the books of account of Fraser, alleging that the sentence laid over in the action referred to them. The respondent replied, that he had laid over no books in the process, and therefore could not give what he had not, and as before, on account of the appellant's default to answer on the main question, requested bar and adjudication of his claim. The Court having ordered the appellant to answer on the main question instantly, it was alleged on his behalf that he conceived the respondent had no demand against him, and therefore declared to persist by his subordinate answer and exception of " *tibi adversus me non competit hæc actio.*"

Appellant per-
sists in his
exception of
non-compet-
ency.

The cause was then brought to a hearing, and the Court, by its sentence of the 28th of April 1823, condemned the appellant and Cameron to pay to the respondent the sum of 28,366 *g.* 16 *s.* 4 *p.* Holland currency, being the amount of the several sums decreed by the sentence of the 16th of December 1807, to be brought to the credit of the estate of Fraser, as also the sum of 27,391 *g.* 18 *s.* 4 *p.* for interest thereon, as calculated, and condemned the appellant and Cameron in all costs of suit.

Sentence
against appel-
lant and
Cameron.

Summation and renovation * having been, at the

* For the nature and effects of these writs see Vanderlinden's Instit., book 3, part 1, cap. 9, sec. 6, 15 and 16.

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Writs of execution and
 gyzeling taken
 out against ap-
 pellant.

Appellant's
 petition for
 penal interdict
 against execu-
 tion.

instance of the respondent, duly served on the appellant, as one of the representatives of the estate of Van Batenburg, in order to obtain due compliance with the said sentence of the Court, and he having made default, the respondent applied for and obtained from the president of the colony a writ of *gyzeling** against him, and on the 7th of June 1823 it was duly served on him.

The appellant did not appeal from the sentence of the 28th of April 1823; but on the 16th of June following, he and Cameron presented to the president of the Court, during its non-session, a petition for a *mandament of penal interdict*† against the execution of the writ of *gyzeling*, and thereby alleged “ that the proceedings, as they were carried on, could not set at rest the matter in dispute, because the respondent could not give a valid release and discharge, so as to defend them from being called on by the several parties interested in the estate of Fraser to pay over again the whole of the debt, or at least a share or shares of one or other of the heirs, and that the respondent ought to have acted not

* For a full description of the nature of this writ, which obliges the person against whom it is obtained to show himself every day at a particular coffee-house until he does the act directed by the Court, and if he does not do it within a month, to confinement in gaol, where if he continues without compliance with the order more than two months, his property may be taken in execution to satisfy the amount of the damages occasioned to the party suing out the writ by his obstinacy,—see Second Report of Commissioners of Inquiry into the Administration of Justice in the West Indies; Vanderlinden's Instit., book 3, part 1, cap. 9, sec. 14, *et seq.*

† See Voet in Pand., l. 43, tit. 1, *de Interdictis*, No. 9; Vanderlinden's Instit., book 3, part 1, cap. 4, sec. 6, *et seq.*

solely, but conjointly with the present guardian of the minors Fraser, the guardian of the minors Stewart, and the widow, and representatives of the estate of Archibald Stewart. That the cause had ceased on account of which the Court had made the appointment of intermediate sequestrators in the estate of Fraser, and that consequently the appointment must of itself cease, and that every further interference without urgent necessity in the affairs of persons who were not incapacitated by the act of the law to manage and administer their own affairs, was illegal, null, and void; and that there arose therefore a 'jus quæsitum,' to the appellant, of opposing all proceedings of the plaintiff, by a regular exception of *non-qualification*. That the several persons interested in the estate of Fraser, who had all committed act of heirship, and accepted the estate, not having been rendered by any law incapable of conducting their own affairs, were the sole legal representatives of Fraser, and were the only persons competent to grant a legal discharge, and consequently the only persons who ought to proceed for the recovery; unless it could be proved that an urgent necessity existed for appointing some other persons to act with them. That the plaintiff had demanded more than he ought to demand, for it would appear from the accounts extracted from the books of Fraser, produced by the appellant, that the estate of Van Batenburg only owed about 6,000*gs.* and the accounts were made out by the representatives of the estate of Fraser, and severally entered into the books of that estate, and rendered as far back as the 1st of August 1810; and they referred to an account signed Robert Proctor, and an extract from a

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letter written by Munro to Layfield and Douglas, as executors of Ross, dated the 26th of December 1810, stating that the account had been made up by the representatives of the estate of Fraser, conformably with the sentence of the Court. That there had thus been established an agreement as to the shares which Van Batenburg and Ross's estate respectively owed to the estate of Fraser, and a complete transaction regarding the amount of each respective share of debt due by each party; and that the *exceptio transactionis, exceptio divisionis, exceptio pacti conventi seu de non plus petendo*, were available to him against the proceedings in execution. That independently of the aforesaid *transaction and division*, which of itself was sufficient to release the estate of Van Batenburg, the representatives of the estate of Fraser had filed their claim for 33,446*gs.* 10*s.* in the course of the proceedings in the Court of the 27th of January 1816, under an edictal summons by T. F. Layfield and R. Douglas, 'as curators to the estate of Ross, deceased, and James Sinclair, curator to the estate of James Sinclair, deceased, against all creditors and claimants on the late firm of Ross and Sinclair, or Plantation Wigg, or the separate estate of Ross and Sinclair'; and the same was referred by the Court to the estate of Ross; and that amount having been thus established against the estate of Ross, could not by any subsequent sentence of the same Court, or even by any attempt to deprive the appellant of his '*jus quæsitum*,' as to his release from that amount, be brought back in account against him. And they objected to the sentence of the Court of the 23d of January 1823, whereby Douglas and Cheney, as curators to

the estate of Ross, were released, and their names ordered to be taken off from the rubric of the cause. That the respondent had refused to produce in Court the books of the estate of Fraser, whereby it would have appeared that the account sued on and demanded in Court was an ex parte statement, and did not give such credit as ought to have been given; and that instead of the action which was brought against the appellant to be condemned in the payment, &c. the respondent ought to have sued him to take over the account thus corrected, pursuant to the sentence in December 1809, and liquidated the same they had taken over; after which liquidation there would then be a defined sum in which the Court could condemn. That the sentence of the Court dated the 28th of April 1823 was not conformable with the declaration and demand, inasmuch as it adjudged more to the respondent than he thereby demanded, for he admitted that deductions ought to be made, and made tender of cession of action. That the honourable member of court, Robert Douglass, even after the estate of Ross had been released, was mainly interested in the cause, in so far as the condemnation of the estate of Van Batenburg, in the manner in which it would lay after the release of the estate of Ross to pay the whole amount of the account, would for ever exclude any regress upon the estate of Ross or his heirs, and therefore he ought not to have concurred in the proceedings and sentence given in the suit."

The president of the Court, on this petition, granted them a mandament of penal interdict. The respondent, on intimation to him of the issuing of the writ, presented his memorial to the Court, and thereby showed various causes of opposition thereto;

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granted by
President of
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 that sentence.

and the appellant thereupon presented his memorial, in which he endeavoured to sustain the interdict by repeating the several grounds stated in his petition. The Court having heard the parties, on the 3d of February 1824, decreed the interdict to have been wrongly and improperly obtained, and ordered the appellant and Cameron to do away the same free of all costs, with interdiction ever to repeat it; and admitted the respondent to proceed with the execution of the sentence of the 28th of April 1823, with condemnation of the appellant in all the costs of those proceedings. From this sentence the appellant was allowed to appeal to His Majesty in Council.

The respondent, Reynolds, died before he had transmitted to this country the necessary documents on his part; and by an order of the Court of Civil Justice, Samuel Firebrace was appointed the sequestrator of the estate of the said James Fraser, in his place, and advocate "pro Deo," for the purpose of protecting that estate.

Adam (K. C.) and *Henry*, for the Appellants,—

After stating the case, strongly impugned the sentence of the 28th of April 1823, for the reasons mentioned in the appellants' petition for the interdict. They then contended that, if the judgment was wrong, execution ought not to have followed, and that it had been always the practice of the Privy Council, in cases where it had not approved of the judgment, to confirm the appeal against the execution. In support of this position, they cited *Hugenholtz v. Watson* * and *Shand v. Brereton* †.

* For *Hugenholtz v. Watson*, see next case.

† Charles Shand and William Shand, appellants, and William Brereton, respondent, was a case heard before the Privy Council,

Horne (K. C.), and *Burge*, for the Respondents :—

The gentlemen on the other side, to make a case,

on appeal from Demerara, on the 2d of June 1827. The appellants were assignees of a mortgage on a plantation called *Peter's Hall*, which had been made on the 30th of March 1803, previously to the conquest of Demerara by the English, and in which there was a covenant to consign the produce of the mortgaged plantation to the mortgagees. The respondent, who was the possessor of the property subject to the mortgage, did not consign the produce according to the covenant, and the appellant applied for and obtained a mandament of *Penal Interdict* to prevent his consigning it to other persons. The respondent opposed this, and on the hearing of his opposition put in a plea of "*Non Qualificatie*," on the ground that the appellants were not holders of the original copy (*grosse*) of the mortgage. The Court below, by its sentence of the 19th of July 1821, annulled the interdict with costs. The appellants then applied to the original mortgagees, and discovered that no *grosse* had ever been taken out by them. Upon this they took one out themselves, and again obtained an *interdict* upon the same terms as before. The respondent again opposed it, and put forward the plea of "*Non Qualificatie*," which was then rejected with costs; he then contended that by the convention entered into between Great Britain and the Netherlands on the cession of the colony, on the 12th of August 1815, a power was given to all proprietors of estates, subject to mortgages made under the old government, to redeem them, or renew them upon certain terms therein mentioned; and that as he had given due notice in the *Gazette* of his intention to renew upon those terms, the appellants were not entitled to the benefit of the stipulations contained in the original contract. The appellants however contended that they had offered to renew upon the terms mentioned in the *Gazette*, when the notice appeared, and that the respondent had refused to renew with them, because they had not the original *grosse* then in their possession; notwithstanding which, they had served him with a solemn notice of their willingness to renew. The sentence of the Court below, on the hearing of this opposition on the 18th of March 1822, was, that the interdict should be dismissed with costs. The Privy Council, on the appeal from this sentence,

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have been obliged to refer to the grounds on which the sentence of the 28th of April 1823 was pronounced, and which are not before this Court. What-

directed that it should be confirmed, with liberty to the appellants to institute such proceedings in the Court below as they might think fit, for the recovery of costs, loss and damages suffered in consequence of the produce of the plantation Peter's Hall not having been consigned according to the terms of the mortgage of the 30th of March 1803.

Simpson, as attorney of Charles and William Shand, appellant, and William Brereton, respondent, was another case between the same parties, heard before the Privy Council on the same day as the preceding, and it arose out of the same mortgage. The appellants had, after the assignment to them, obtained a *Willing Condemnation* from the respondent for the amount of the principal and interest secured thereon, and they passed this before counsellor commissaries in the colony, on the 8th of August 1817. Disputes having arisen between the parties, the respondents brought an action in the Court below for the payment of their principal and interest. The Court, by its sentence of the 21st of April 1825, renewed the *Willing Condemnation*, with liberty to the appellants to proceed in execution against the plantation Peter's Hall for the principal sum of 85,000*gs.* Hollands currency, together with interest; reserving, however, to the respondent his right in execution against the amount of interest which would be claimed under the sentence. The appellants took out execution for the principal sum of 85,000*gs.*, and a sum of money for interest upon it much exceeding its amount. The respondent obtained a mandament of Penal Interdict against this execution, and the Court, by a sentence of the 13th of July 1823, confirmed the interdict, and ordered the respondents in *Raue Actie* to pay the appellants the amount of the original mortgage money, and a sum of money by way of interest equal to it. On the hearing of this case before the Privy Council, on the 2d of June 1827, their Lordships were of opinion that, according to the law of Holland, the amount of interest on a mortgage ought not to exceed the principal, and therefore that the sentence of the Court below, of the 13th of July 1823, ought to be confirmed; but the appellant's counsel

See Vander-
lind. Instit.,
book 3, p. 1,
cap. 3, sec. 3.

See Van Leu-
ween's Roman
Dutch Law,
book. 4, cap. 7,
sec. 6.

ever this Court may do with regard to the interdict, that sentence must still remain. The attempt here made is equally repugnant to the principles of the Civil, as it is to those of the English Law. After a demand has been established by the sentence of the Court below, and after acquiescence in that sentence, the appellant comes here to complain of the execution of it, upon grounds which it was in his power to have urged on the hearing of the cause, as reasons for the Court making a contrary decision from what they have very properly done in the present case. The process of *interdict* does not issue from the Courts of Demerara and Berbice in cases where the sentence is disputed, but in cases where new facts have arisen after it has been pronounced, or there has been some excess, or irregularity in the execution of it. Here the reasons offered to induce the Court to grant the *interdict* were improper, because they impugned the judgment, not the execution. Voet, *Comm. ad Pand. l. 44, tit. 1, numo. 7*, says, "Nec prætermittendum etiam post sententiam in executione non modo opponi posse ex jure civili Velleianæ, Macedonianæ, et cederum actionum exceptiones sed et aliæ plures

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insisting that the sentence of the 21st of April in that year was not so distinct as it ought to have been, and that the principal and interest ought to have been ordered to have been paid in Holland currency payable at Amsterdam, the appeal was ordered to stand over, with liberty to the appellant to present a petition for leave to appeal against that sentence. He presented a petition accordingly, which was heard on the 23d of February 1828. On the hearing, the prayer of his petition was not granted. The petition was dismissed with 10*l.* costs; and his original appeal, which came on again on the same day, was also dismissed.

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“ peremptoriæ, si non impugnetur per eas sententia, sed executio tantum impediatur, vel restringatur.” All the cases relating to interdicts that can be found in the books are on circumstances that have happened subsequent to the judgment. In the case of *Hugenholtz v. Watson*, which was quoted on the other side, the Master of the Rolls (Sir J. Leach), so far from sanctioning the doctrine they contend for, would not hear the appeal against the execution of the sentence, although, under the peculiar circumstance of the case, he gave permission to the parties to enter an appeal against the sentence itself. In *Shand v. Brereton* there were two appeals. In the one the interdict proceeded on an irregularity in the execution of the judgment, but in the other case between the same parties, on showing cause before the full Court below, the interdict was set aside, and that decision was confirmed in this Court. The Counsel were desired by the Court to refrain from arguing the merits of the case.

Adam, in reply,

Admitted that the two cases of *Shand and Brereton* were inapplicable upon the present occasion; but he contended that it never could, in natural justice, be right that execution should issue when the sentence was wrong. There was nothing that ought to prevent persons, when they were injured by a decree, from appealing against the execution of it. It was a general principle of law, that an executor should not be answerable for more of his testator's estate, than had come into his possession, and that he was not responsible for the acts, or the negligence of those joined with him in the executorship. If

this sentence, however, was to be carried into effect, the appellant would have to answer not only for what he was properly chargeable with, as the representative of the estate of Van Batenburg, but also for all that had been received, and not accounted for by Ross. The truth was, the merits of the case were never entered into before the Court below. The appellant's exception of *non-qualification* and *plea* to the *competency* of the plaintiff in that action were overruled. He still persisted in his exception, and refused to plead over to the merits. He thought he had good ground to go upon, he was mistaken, and such conduct perhaps could not be legally justified. But because the merits were not gone into before the sentence, there was no reason that they should not be discussed afterwards, especially in this Court, which did not suffer itself to be bound by technical rules, but always endeavoured to reach the real truth and justice of the cases brought before it. Here the appellant was only the representative of other parties, and if their Lordships should feel disposed to overrule the present appeal, it was to be hoped that they would not punish the persons really interested for the pertinacity of their representative, and that they would therefore, in this case, allow the appellant to enter an appeal against the sentence of the 28th of April 1823, as had been done in the case of *Hugenholtz v. Watson*.

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Lord WYNFORD:—

Mr. Adam, at the close of his argument, has applied for leave to appeal against the original judgment pronounced in this case: that would have

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been the proper course to have pursued originally, but we have no matter now before us to enable us to decide whether we should now let him in to appeal or not. He is, indeed, perfectly correct in what he has stated, that it is the practice of this Court to advise his Majesty to pass by matters of form, and to get at the substance and real justice of the case; but we must be careful that we take the right course to get at that justice. After the shameful delay that has taken place in this cause, owing to the scandalous pleading of the appellant, we should like to hear a great deal more of the original judgment, than we now know, before we should be disposed to let the parties in to appeal against it. I can conceive many grounds on which that judgment may be perfectly consistent with equity and justice. Mr. Adam says that one executor is not answerable for the acts of another. So general a proposition (even if it can be admitted according to the law of Holland) must be subject to this proviso, that there has been no connivance, or negligence on the part of the one who desires to be excused. Here there is strong reason to presume connivance. Both the executors were living in the same colony, and most probably near to each other, and both have been proved to have kept the trust property in their own hands for several years, instead of bringing it to account for the benefit of the testator's family. In such a case we should not inquire which of them has embezzled the largest proportion of the funds committed to their joint care, but we should say the conduct of these parties has been such, that each of them must answer for the acts and defaults of the other. These trading executors must be

strictly watched ; not only what they do, but what they permit to be done, must be attended to ; they must not be allowed to keep open the accounts of their testators' estates, that they may prolong the period during which they are to receive 10 per cent on the proceeds of the property.

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But the Court are inclined to dispose of the case upon this short ground, that it would be a most inconvenient doctrine, and inconsistent with the principles of justice, to allow a man to appeal against a writ of execution, and upon that appeal to go into the merits of the original judgment. It would increase that delay, which is at present one of the greatest curses in the judicature of the West Indies, if a man was not bound to appeal when the judgment was given, but was allowed to wait until these writs had run their time. Let us remember that we are, in 1829, disposing of a judgment in a suit instituted in 1807. If we delay still longer the execution of that judgment, it will be productive of great inconvenience and expense. I shall, as long as I sit here, endeavour to make people appeal in the first instance, or consider that they have waived their right to do so.

In this case, I think, the Counsel for the respondent have put the point on which we are to decide, on a ground that is unanswerable, and which their learned opponent has not attempted to answer. If (say they) you appeal against a penal interdict (which is like our *audita querelâ*), it must be on account of something that has occurred between the judgment and the execution ; you can go into no matter that might have been offered to the Court before such judgment was pronounced. The

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original judgment stands untouched, and the only admissible ground of complaint is, that the execution was not warranted by it. We may conclude by implication from the words of the learned writer that have been cited to us, that by an appeal against the execution you admit the justice of the judgment, and that is a principle undoubtedly consistent with the law of our own country, and founded upon common sense.

I cannot say I think the appellant will ever be able to present the sort of case that will entitle us to do what was done in the case of *Hugenholz v. Watson*. I have the petition before me, which was presented in that case, to enter an appeal against the original judgment. That is the kind of petition which ought to be presented here. If it is presented, the Court will deal with it according to its merits; but this appeal must be dismissed with costs.

Appeal dismissed with costs.

No petition for leave to appeal against the original sentence was presented on behalf of the appellant.

The practice in Holland seems to have been formerly in conformity with this decision.

Van Leuween, in his *Censura Forensis*, pars 1, lib. 2, cap. 23, sec. 14, states it in these words: "Ipse condemnatus, si executioni se opponere voluerit, propterea quod executio extra ordinem, et procedendi modum intentatur, ipsum sententiae sensum invertat, aut secus, quam ejus tenor permittit, interpetando inique adversus condemnatum exequatur, aut quod solutionem, compensationem, aut aliud peremptorium remedium allegare voluerit, superioribus tribunalibus haud aliter, quam per poenale mandatum ad id impetrandum, executionem impedire, aut inhibere potest, quia condemnatus adversus

“sententiæ executionem regulariter audiri non potest, quod
 “appellationis vice fungitur, quæ licet adversus executionem
 “admitti non debeat, in excessu tamen et pro solutionis, com-
 “pensationis, aut simili peremptoriâ exceptione admittitur, si
 “modo de iis liquido constet. In inferioribus tamen tribunali-
 “bus per praxin introductum est, ut indifferenter tam ipse
 “condemnatus quam quivis alius sese executioni opponens
 “admittitur suspensâ interim executione ad proximum diem
 “juridicum, quo oppositionis suæ rationes proponere tenetur.”

See also Grotii Gul. Isagoge ad praxin Fori Batavici, lib. 2, cap. 7, sec. 20; the Codex, lib. 7, tit. 65, l. 5; and the Pandects, lib. 49, tit. 1, l. 4.

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ON APPEAL FROM DEMERARA.

NATHANIEL HUGENHOLTZ (as Attorney } *Appellant.*
for Messrs. Spoors & Sprenger)

And

20th February 1830. RICHARD WATSON (as Attorney for } *Respondent.*
Mrs. Elizabeth Brotherson) - - }

A claim made in Demerara for a sum of money, *Hollands currency*, held to mean the currency of the colony, which is called *Hollands currency*.

A plaintiff cannot take out execution for 15 per cent more than a sum of money *Hollands currency*, awarded him by a sentence of the Court at Demerara in pursuance of such a claim, on the ground that it was filed for a debt due on a mortgage made in Holland, and that there is the difference of 15 per cent between the *Hollands currency* of Holland and the *Hollands currency* of Demerara.

ON the 23d of April 1789, Joseph Brotherson, a planter of Demerara, signed and acknowledged before the tribunal of the first instance, at Middleburgh, in Holland, according to the forms of the Dutch law, a deed or instrument by which “ he for himself, and for his wife, the respondent, Elizabeth Brotherson (for which purpose he had been duly authorized by a power of attorney from her) jointly and each *in solidum*, acknowledged to be indebted to Messrs. Spoors & Sprenger, merchants, within the said town, a capital sum of 11,662 pounds 6 schellings and 9 grote, Flemish, or 69,974 guilders 8 pennings; and promised to faithfully pay and discharge the same, to the said Messrs. S. & S., or those that might obtain their right or title, by yearly instalments of 3,000 guilders or more, but not less; and to pay interest on the same capital sum as long or for as much of it as should remain unpaid, at the rate of 6 per cent per annum, such interest and yearly instalments to be remitted before the successive days of payment, by produce or good bills of exchange, without prejudice to the power of Messrs. S. & S. to demand the whole capital, provided they gave a year’s warning; and for performance and secu-

" rity of the said capital sum and interest, the said
 " J. Brotherson declared specially to bind and mort-
 " gage his cotton estate, called Elizabeth Hall,
 " situate in the said colony of Demerara." This
 deed also contained covenants from Brotherson, to
 consign the produce of the plantation to, and to pur-
 chase the supplies for it from Messrs. S. & S.

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Elizabeth Brotherson became on the death of
 her husband, in 1816, the sole proprietress of the
 plantation Elizabeth Hall. Some disputes arose
 between her and Messrs. Spoors & Sprenger, re-
 specting this mortgage, and in the year 1822 the
 appellant filed a claim or demand in the Court of
 Criminal and Civil Justice in the colony, against
 the owner or owners of the plantation. In this claim
 he exhibited the mortgage-deed of 1789, and two
 accounts current made out in guilders and stivers
Hollands currency, founded thereon, between Messrs.
 Spoors & Sprenger, and the plantation Elizabeth
 Hall, showing a balance against the plantation of
 83,542 *gs. 16 st. Hollands currency*, with interest
 thereon from the 31st December 1821. To this claim
 the respondent put in a claim and demand in *re conven-*
*tione**, and an answer in *conventionne*. On the 14th of
 January 1825, the cause came on for a hearing, and
 the Court ordered it to be referred to † its sworn
 accountant, to take the accounts between the par-

* For the nature of a defence of this description, which re-
 sembles our cross-bill in equity, see Van Leuween's Roman
 Dutch Law, book 5, cap. 18; Vanderlinden's Institutes, book 3,
 part 1, cap. 2, sec. 18; and Voet, in Pan. lib. 5, tit. 1, Nos. 78
 to 89.

† For a description of the nature and duties of this office,
 which appear to be very similar to that of a Master in Chancery,

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ties. Upon his report of what was due to Messrs. Spoor & Sprenger, the Court, on the 19th of May in the same year, condemned the respondents to pay to the appellant, on cancelment of the mortgage-deed, the sum of 44,502 *gs.* 5 *st.* 4 *p.* *Hollands currency*, with interest from the 1st of January 1823, and the sum of 7,398 *gs.* 12 *st.* 7 *p.* *Hollands currency*, without interest, with condemnation of the respondent in the costs of the suit; and declared the plantation Elizabeth Hall *cum annexis* liable and executable for this sentence.

The respondent paid the appellant the costs, and tendered him the two sums 44,502 *gs.* 17 *s.* 11 *p.* and 7,398 *gs.* 12 *s.* 7 *p.*, with interest on the first sum from the 21st of January 1822 to the 13th of May 1825 (the day on which the tender was made), amounting altogether to the sum of 61,023 *gs.* 17 *s.* 11 *p.* in the currency of the colony, which is generally called *Hollands currency*. This tender was refused by the appellant, who claimed an additional sum of 15 per cent on the amount tendered him, to make up the difference between the then currency of Holland, in which he contended the payment ought to be made, and the colonial currency called *Hollands currency*; and he proceeded to take out execution against the plantation. The respondent then paid the amount of his tender into court, and obtained a *mandament of penal interdict*, prohibiting the appellant from proceeding in such execution. The appellant then

see the 2d Report of the Commissioners for Inquiry into the Administration of Criminal and Civil Justice in the West Indies, page 17.

petitioned the Court to set aside this *mandament*, and to permit him to proceed in execution for the sums ordered to be paid to him by the sentence of the 19th of May, and that payment should be made of them "either in bills, mentioning the *causa debiti*, "drawn on Holland or on England, made payable "on *Holland* for the amount in guilders, *Hollands* "currency, or in cash, *Demerara* currency; and "if in cash, *Demerara* currency, then with the "addition of 15 per cent *agio* on the amount in "*Hollands* currency, or in such other manner as the "Court should please to direct."

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On the 12th of July 1825, on the hearing of this opposition, the appellant produced evidence to show that the difference between the then actual currency of Holland, and the colonial currency called *Hollands* currency, was 15 per cent. The Court, however, by its sentence on that day, confirmed the interdict, and in *Raue Actie* (with regard to the main or original question between the parties) condemned the appellant to receive, in full satisfaction of the sentence of the 19th of May, the sum paid by the respondents into court, as being the amount of capital and interest due on the said sentence of that day, under deduction nevertheless of the costs incurred in depositing the said sum, and subject to the cancelment of the mortgage, with condemnation of the respondent in costs of the proceedings.

From this sentence, the appellant appealed to his Majesty in council. On the appeal coming on for hearing before the Privy Council on the 10th of May 1828, it was ordered to stand over for a week, with liberty to the appellant to present a petition to appeal against the sentence of the 19th of May

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1825. He presented a petition for that purpose, and on the 7th of June 1828 was granted permission to appeal. The former appeal was then ordered to stand over, and the case came on before their Lordships, on both appeals, on the 20th of February 1830.

Adam (K. C.) and *Pemberton* (K. C.), for the Appellant:—

There are two questions in this case: first, whether according to the terms of the original contract the appellant is entitled to the principal, and interest secured on it, in Hollands money current in Holland; 2dly, whether, being so entitled, he made a proper demand of what he was entitled to in his claim. On the first point it can only be said, that the mortgage was made at Middleburgh in Holland and the payments of the interest and of the instalments were stipulated to be made either in produce or good bills of exchange to the appellants, who were merchants residing at Middleburgh. It cannot therefore be doubted that the original intention of the parties to the mortgage-deed was, that these payments should be in Hollands currency in Holland. It would be just as reasonable to say, that you could satisfy a mortgage made in England of lands in Jamaica, by a payment in Jamaica currency, as to say, that you could satisfy a mortgage made in Holland of lands in Demerara, by a payment in Demerara currency. As to the other question, the claim set out the mortgage, and referred to two accounts kept by the appellants in Dutch money in Holland, in which they had given credit to the respondents for the shipments of produce, which had

been consigned to them in pursuance of the stipulations in the mortgage, when they had received them, and converted them into Dutch money current in Holland; the claim therefore must be presumed to ask for payment in the only money to which it refers.

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Pepys (K. C.), and *Teed*, for the Respondents:—

The appellant got by the judgment what he asked for in his claim. Now, can a man be heard to complain against a sentence which gives him what he asks for? After the sentence, the appellant says he is entitled to 15 per cent more than what he gained by it, to make up the difference of exchange between Demerara and Holland; but the rate of exchange continually fluctuates: this demand arose during a long period of years, and in order therefore to entitle him to have anything on account of this difference, he ought to have asked for a reference to the sworn accountant, to have inquired into the rates of exchange between the countries during that period; he asked, however, for nothing of the kind, and had he done so, his demand would have been met upon the merits. The only point disputed between the parties in the court below, previously to the sentence of the 19th of May, was, whether the appellants were entitled to simple or compound interest. There is nothing whatever, either in the original mortgage-contract, or elsewhere, to show where the debt was contracted. But this question has been previously decided by this Board in *Shand v. Brereton*, in which the mortgage

* See p. 160, *supra*.

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was made under exactly similar circumstances ; the only difference between that case and the present is that the mortgage in that case had the additional security of a *willing condemnation*.

Adam, in reply :—

The decision in the case of *Shand v. Brereton* was upon the ground that there was no appeal against a sentence of **willing condemnation*. *Hollands currency* is a term used in the colony to distinguish an account kept in guilders and stivers from one kept in pounds sterling ; but by referring to a mortgage made and accounts kept in Holland, it is clear that the appellant must have meant by the term *Hollands currency*, money current in Holland.

The MASTER of the ROLLS :—

The Court of Justice in Demerara in this case made a decision, ordering the respondent to pay to the appellant a certain sum ; the respondent tendered to the appellant the amount of the sum awarded to be paid by him ; this tender was refused, and the respondent, by an application for an interdict, then called upon the Court below to give a construction to their former decision by a new decree. The Court declared that it meant only by their first decree to give a sum in guilders, and that a proper tender had been made in performance of it. Against this last decision the present appellants appealed : upon hearing their appeal, their Lordships were of opinion that the Court below could not have done

* See Van Leuween's Roman Dutch Law, book 5, cap. 25, sec. 8.

otherwise than decide that the respondents had tendered that sum in guilders at Demerara, which they had ordered him to pay in guilders at Demerara. The appellant's Counsel then argued, that the decree was wrong, because the appellant was entitled not only to the sum awarded him, but also to so many more guilders as would have made up the difference of exchange between Demerara and Holland, This Court then said, if you are entitled to what you claim, you must appeal against the original decree, in order that you may make out, according to the form and substance of your claim, that you are entitled not only to the sum given you, but also to the sum of 15 per cent more, to be paid you at Middleburgh. Looking now at the appellant's claim, we find no demand made of this kind; he asked for a certain amount of guilders in Demerara. How could the Court give him 15 per cent more than the amount asked for? It is perfectly plain that he made no such demand at that time as is now made for him, and these appeals must therefore be dismissed.

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Both appeals dismissed with costs, to be taxed by the Master.

The case of *Mint Monies* in *Sir J. Davis's Reports*, page 28, would appear to carry the doctrine that payment should be made in the current money of the country where the execution is taken out, to a greater extent than the present decision. After quoting from Budelius de rê nummariâ, the maxim that "Con-
"suetudo, et statuta loci, in quem est destinata solutio respi-
"cienda sunt," Sir John proceeds to say, that if upon a judg-

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ment in debt given in England, a writ of execution should be awarded to the Justice or Deputy of Ireland to levy the debt there (for the form of which he refers to Reg. Brev. Jud. fo. 43, b. *), the sum should be levied according to the rate of Irish money, and not of English money, and in such coin as should be current in that kingdom at the time of execution made. If the same principle prevailed in the law of Holland, even had Demerara remained under the dominion of that country, and the appellants recovered the amount of their claim in Middleburgh, they could have only taken out execution in the colony for the sum they had recovered in the colonial currency. In the countries governed by the law of England, points of this description can seldom arise, since the decision in *Kearney v. King*, 2 Barn & Ald. 302, that upon a declaration in assumpsit on a bill of exchange for 548*l.* 1*s.* 8*d.*, drawn and accepted at London, to wit at Westminster, it must have been taken to have been drawn for English money, and that proof of a bill drawn at Dublin in Ireland for a similar sum in Irish money, did not support the declaration.

* This writ appears to have been long disused. See *Otway v. Ramsay*, in a note to *Harris v. Saunders*, 4 Barn. & Cress. 414.

ON APPEAL FROM JAMAICA.

WILLIAM WHITE and DANIEL }
STEPHENSON - - - - } *Appellants.*

And

JOHN PARNTHER and ISABELLA }
PARNTHER - - - - } *Respondents.* Dec 1st, 2d,
and 21st,
1829.

BY virtue of the will of William Bucknor, made on the 10th of November 1757, his two sons, Samuel Bucknor and Thomas Bucknor, became entitled, as tenants in common in tail, to the Hopewell estate, and the slaves thereon, with cross remainders in tail; and they also became entitled, in equal moieties, to considerable personal estate, subject (among other legacies) to a legacy of 1,500*l.* currency to the testator's daughter Frances Gent Bucknor.

A. mortgaged an estate in 1774; he left by his will, in 1775, an annuity to his widow in lieu of dower. W. the original mortgagee subsequently mortgaged his interest in this estate to Messrs. R. & Co. In 1786,

Messrs. R. & Co. filed a bill against W. and the real and personal representatives of A. for the purpose of obtaining a foreclosure. By a decree in this suit in 1791, a declaration was made that the widow, having relinquished her title to dower, became a *bond fide* purchaser of the annuity, and was entitled to be paid it out of the mortgaged estate. This suit not having been prosecuted, and the widow having died in 1794, her representatives, in 1822, filed a bill against the heir of W. and other persons claiming under him, and the heirs and devisees of A., for the payment of the arrears of the annuity during her life-time, or that the estate should be sold, and the arrears be paid out of the proceeds. Held, on appeal, that the annuity, having not been expressly charged on the real estate of A., was a mere pecuniary legacy, and that the decree of 1791 was erroneous, in declaring that the widow was entitled to be paid it out of the mortgaged estate.

When a Court of Equity is called upon to carry into execution a former decree, it is not bound to do so, if upon inquiry into the merits, it appears to have been erroneous.

The remedies for the recovery of the arrears of such an annuity were held to have been lost by length of time.

The mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shown that there is collusion between them and the mortgagees.

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Death of
S. Bucknor,
and descent of
his moiety of
Hopewell es-
tate to John
Bucknor.

Samuel Bucknor, in the year 1761, by indentures of conveyance and reconveyance, according to the law of the island, barred all estates tail and remainders, in the real estate and slaves, of which he was seised under his father's will; and afterwards, by his will, dated the 19th of November 1761, gave (amongst other legacies) a legacy of 1,000*l.* currency to his sister Frances Gent Bucknor; and he gave the residue of his real and personal estate to his brother Thomas Bucknor; but his will not having been executed so as to pass real estates, the moiety of the Hopewell estate, of which he was seised under his father's will, descended to his brother John Bucknor.

1769.

Suit by F. G.
Bucknor, for
recovery of
her legacies.

In the year 1769, a suit was instituted in the Court of Chancery in Jamaica, in which F. G. Bucknor, who had then become the wife of Donald Campbell, and her husband, together with George Gordon, to whom her legacies had been assigned as a trustee, were complainants, and John and Thomas Bucknor were defendants, for the purpose of recovering her two legacies of 1,500*l.* and 1,000 *l.*, with interest.

Decree 26th of
May 1774,
making 1,500*l.*
legacy a lien
on Hopewell
estate, and
1,000*l.* legacy
lien on slaves
of Hopewell
estate.

By a decree in this cause, of the 26th of May 1774, John Bucknor, who was the surviving acting executor of William Bucknor's will, was ordered, out of the personal estate of William Bucknor, and out of the profits of his real estates and slaves, to pay to the complainants the sum of 1,826*l.* 5*s.*, being the amount of the legacy of 1,500*l.*, with interest thereon from the 17th of July 1773, together with the costs of the suit; and in default of payment, that the Hopewell-estate slaves, cattle and stock, should be sold to satisfy the same; and

the legacy of 1,000 *l.* was declared to be a lien upon the personal estate and slaves of Samuel Bucknor; and it was ordered that John Bucknor, who was the acting executor of Samuel Bucknor's will, should out of the personal estates of Samuel Bucknor, and the profits of his slaves, pay the complainants the sum of 1,630 *l.* 17 *s.* 8 *d.*, being the amount of the legacy of 1,000 *l.*, with interest from the year after Samuel Bucknor's death; and in default of payment, that so many of the slaves on the Hopewell estate, as should remain after payment of the legacy of 1,500 *l.*, interest and costs, and also the slaves of Samuel Bucknor, should be sold to satisfy the same.

Before any further proceedings were had in this cause, William White the elder purchased the interest of Donald Campbell under this decree, for 4,375 *l.* 19 *s.* 3 $\frac{1}{2}$ *d.*; and by an indenture dated the 19th of September 1774, the full benefit of it became vested in him.

On the 1st of November 1773, John Bucknor executed a mortgage in fee to White the elder of an estate called Spring Valley, with the cattle, stock and slaves thereon; and on the 26th of August 1774, John Bucknor, and Ann his wife, afterwards Ann Parnter, and Thomas Bucknor, executed a mortgage in fee to White the elder, of the Hopewell estate and slaves, for securing the repayment to him of the sum of 10,000 *l.* currency. After this mortgage the consignments of the produce of the Hopewell estate were always made either to or on account of White the elder, till he obtained possession of the property.

John Bucknor, by his will of the 9th of January

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19 Sept. 1774.
 Purchase by
 White the
 elder of bene-
 fit of decree of
 6th May 1774.

Mortgages to
 White the
 elder: 1st Nov.
 1773, by John
 Bucknor, of
 Spring Valley
 estate; and
 26th August
 1774, by
 J. Bucknor
 and his wife,
 and Thomas
 Bucknor, of
 Hopewell
 estate.

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1775.
 Will and death
 of John Buck-
 nor, and mar-
 riage of his
 widow to
 Parnther.

1775, bequeathed to his wife Ann Bucknor, afterwards Parnter, the sum of 300 l. a year, in bar of dower; and after giving to his three daughters, Mary Lauderdale Bucknor, Ann Dunn Bucknor and Elizabeth Witter Bucknor the pecuniary legacies therein mentioned to be paid out of his estate, he gave to his four sons, William Tracy Bucknor, John Francis Bucknor, James Joseph Bucknor, and Thomas Samuel Bucknor, the residue of his estates, both real and personal, as tenants in common; and he appointed William White the elder, Ephraim Dunn, and his wife Ann, his executors and executrix. He appears to have died shortly after the date of his will, which was proved by Dunn and his widow alone, who soon after his death intermarried with John Parnter.

1776.
 Suit by White
 the elder, for
 foreclosure
 and sale of
 Spring Valley
 and Hopewell
 estates.

White the elder never intermeddled with the executorship of J. Bucknor's estate; but in the year 1776, he filed a bill in the Court of Chancery of Jamaica, against William Tracy Bucknor and the other sons of the testator, John Bucknor, the devisees under his will, and against Ephraim Dunn and John Parnter and Ann his wife, for an account of what was due for principal and interest in respect of the two mortgages of the Spring Valley and Hopewell estates, for a foreclosure and sale of the Spring Valley estate, and for an inquiry whether it would be for the benefit of the parties interested under the will of John Bucknor that any surplus monies which should remain after payment of his claim upon the Spring Valley estate should be applied in payment of his demands upon John Bucknor's moiety of the Hopewell estate. Various

proceedings were taken in this suit, and on the 25th of July 1777 a decree was made in it, directing a sale of the Spring Valley estate, and that the monies to arise thereby should be applied in the manner prayed by the bill.

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The Spring Valley estate was accordingly sold on the 4th of December 1777, for 14,600*l.* currency. And on the 1st of May 1778, the Master reported that out of the money arising from the sales he had paid the attornies of White the elder the sum of 8,060*l.* 8*s.* 9½*d.* reported due to him, with interest from the date of the report to the time of the sale, making together the sum of 8,318*l.* 7*s.* 5½*d.*, together with the complainant's and defendant's costs; and that he had also paid to the same attornies of White 5,660*l.* 2*s.* 2*d.*, the amount of the surplus monies which remained, towards payment and satisfaction of John Bucknor's proportion of White's demand of 38,699*l.* 2*s.* 7½*d.*, previously reported due to him on the mortgage of the Hopewell estate.

4th Dec.
 1777.
 Sale of Spring
 Valley estate,
 and part of
 proceeds of
 sale applied
 towards pay-
 ing off mort-
 gage on Hope-
 well estate.

It appears that previously to the sale of the Spring Valley estate, White the elder, by a mortgage of the 1st February 1777, transferred to Messrs. Roebuck & Co. his mortgage of the 26th of August 1774, on the Hopewell estate, and the 10,000*l.* and interest hereby secured, for the purpose of securing to them such sums of money as on the 1st of August then next should be due for advances made by them for the use and accommodation of him and his partners, with interest at 5 per cent, from the respective times of advancing the same: and on the 1st of March 1777, by deed-poll indorsed on the last deed, as a further security for the monies which should be so due to

1st Feb. 1777.
 Sub-mortgage
 of Hopewell
 estate by
 White the
 mortgagee to
 Messrs R. &
 Co.

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 PARTNER.

Roebuck & Co., White the elder assigned by way of mortgage to Roebuck & Co. the sum of 5,200 *l.*, by the decree in the suit of *Campbell and others v. Bucknor and others* decreed to be paid to Campbell and wife, and which had become vested in White by the assignment of the 19th of September 1774; and also the sum of 7,000 *l.*, the amount of several judgments in the deed-poll mentioned to have been obtained in the supreme court of Jamaica, against John Bucknor and Ann his wife, and Thomas Bucknor, or against William Bucknor the father, some or one of them, and against the Hopewell estate, and which had been duly assigned to White; and all interest in respect of the 5,200 *l.* and 7,000 *l.* so assigned, and the benefit of the decree and judgments.

1780.
 White, the
 mortgagee, ob-
 tains posses-
 sion of Hope-
 well by an
 ejectment;

In the year 1780, White the elder, as the attorney of Roebuck & Co., obtained a judgment in an action of ejectment against Thomas Bucknor, who was then in possession of the Hopewell estate; and on the 21st of May 1781, a writ of possession was executed, under which he obtained possession of it.

1st Jan. 1784.
 and purchases
 T. Bucknor's
 moiety.

On the 1st of January 1784, Thomas Bucknor and his wife, in consideration of 3,700 *l.*, conveyed to White the elder the equity of redemption of their moiety of the Hopewell estate, to which they were entitled subject to the mortgage of the 26th of August 1774.

Nov. 1786.
 Suit instituted
 by Messrs.
 R. & Co. for
 foreclosure of
 Hopewell es-
 tate.

In November 1786, John Roebuck and John Farrar, as the surviving partners of the firm of Roebuck & Co., filed their bill in the Court of Chancery in Jamaica, against White the elder, and against Tracey Bucknor, John Francis Bucknor, James Joseph Bucknor, and Thomas Samuel Bucknor, the four sons of John Bucknor, and the devisees

named in his will; Mary Lauderdale Bucknor, Ann Dunn Bucknor, and Elizabeth Wilton Bucknor, the daughters of John Bucknor, and the legatees under his will; and John Parnther and Ann his wife, and Ephraim Dunn, the executors of his will, praying for a foreclosure and sale of the Hopewell estate.

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This cause came on to be heard on the 25th of May 1791, and on the 24th of August in the same year, the then Chancellor declared it as his opinion, and decreed that Ann Parnther, by relinquishing her rights and title to dower and thirds out of the estate of her late husband John Bucknor, deceased, became a *bond fide* purchaser of the annuity of 300*l.* a year bequeathed to her by his will, and that she was entitled to receive and be paid the same out of his moiety of the Hopewell estate; but that the said annuity, and the payment thereof, ought to be postponed to the following demands, then vested in the complainants by assignment from William White the elder, and the monies then due and owing, or to become due and owing thereunder (that is to say): all judgments against William Bucknor, the father of the said John Bucknor, and against his estate; the decree of the 26th of May 1774, made in the cause "*Campbell and others v. Bucknor and others*;" and the mortgage on the Hopewell plantation, of the 26th of August 1774. And it was referred to the Master to take an account of what was due and owing to Parnther and his wife, for the arrears of the annuity of 300*l.* bequeathed to her by the will of John Bucknor, with various other directions, which are immaterial to this case.

25th May
1791.
Decree declar-
ing Mrs. P.
entitled to an-
nuity out of
Hopewell es-
tate.

Roebuck and Farrar, Parnther and his wife, and

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 {
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 v.
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White the elder, were allowed leave to appeal against this decree; and Roebuck and Farrar, on the 15th of November 1793, took out the necessary papers for that purpose, but this appeal was never presented, and no further proceedings were ever taken in this suit, except filing a bill of revivor, against the representatives of Parnther at his death.

Will and death
 of Mrs. P.

Ann Parnther survived her husband Parnther, and died without having received any part of her annuity; and by her will, dated the 16th of January 1794, after giving sundry specific legacies, particularly referring to her claim in respect of the said annuity, and directing that it should be applied in increasing the capital of her estate, devised and bequeathed all her real and personal estate to her daughters by her husband John Bucknor, and to the respondents John Parnther and Isabella Parnther, her children by her husband Parnther; and she appointed George Scott, John Scarlett, William Brown, and Samuel Morris, her executors; of these, Brown alone, on the 8th of October 1794, proved her will; and he and the other executors having all died, letters of administration to her estate and effects were granted on the 19th of February 1821 to the respondent John Parnther.

25th Sept.
 1796.
 Sub-mortgage
 by White the
 mortgagee to
 Burton.

White the elder mortgaged the Hopewell estate by a demise for a term of 1,000 years, and also the 10,000*l.* secured on it, by an indenture, dated the 25th of September 1796, to George Burton, as a security to him for the repayment of 8,000 *l.* and interest on it, at the rate of 5*l.* per cent per annum. On the 24th of July in the same year he had made his will of that date, and therein, after giving several

Will and death
 of White.

legacies, he devised and bequeathed the residue of his estate, real and personal, to his nephew, the appellant White. The exact time of the death of White the elder did not appear from the papers in this appeal, but his will was stated to have been proved in the year 1798.

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 v.
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By a memorandum of agreement in writing, dated the 9th of January 1811, and made between the appellant White, of the one, and George Burton of the other part, after referring to the mortgage of the 25th of September 1796, and reciting that Messrs. Roebuck and Farrar, or their representatives, were then in possession of the Hopewell plantation, and in the receipt of the consignments thereof as mortgagees, and that their accounts in respect of such consignments were then unsettled and unadjusted; and that Messrs. Roebuck and Farrar, being so in possession, and having received the whole of the consignments thereof for many years prior to the date of the said mortgage of George Burton, up to the date of the agreement, and being still possessed thereof, neither White the elder, nor the appellant William White, had derived or received any benefit or advantage whatsoever from the plantation since the date and execution of such mortgage; and further reciting that the appellant White had since the decease of White the elder, his uncle, caused the accounts of Messrs. Roebuck and Farrar, and their representatives, in respect of the said mortgaged premises, to be inspected and carefully compared with the vouchers of the account, and statements of their receipts and payments to be made, from the commencement thereof in the year 1779 to the 1st of May 1807, and the said mortgagees' accounts subsequent

9th Jan. 1811.
 Agreement
 between ap-
 pellant White
 and Burton as
 to remission
 of interest on
 his mortgage.

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 {
 WHITE
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to that period were also then stating and under examination, and great progress had been made in completion thereof to the 1st of May 1810, and the mode of the liquidation of the principal money and interest claimed by the mortgagees had been stated, for the purposes of ascertaining the balance of their accounts, and closing the same: and the appellant White having thereby relieved Burton from the trouble and expence of such adjustment, it was agreed, in consideration of the premises, that Burton should remit to the appellant White the payment of all interest due upon the 8,000 *l.* from the date of the mortgage security of the 25th of September 1796 to the 1st of January 1811, amounting to 5,450 *l.* 10*s.* 2*d.*; the appellant White agreeing on his part to pay the principal sum of 8,000 *l.*, with 5 *l.* cent interest thereon from the 1st of January 1811.

5th March
 1814.
 Conveyance by
 sub-mortgagees,
 Messrs. R. & Co., to
 trustees for
 appellant
 White.

In the year 1814, John Farrar, the only surviving partner of the firm of Roebuck & Co., and the several legal representatives of the deceased partners, having ascertained that, on the balance of accounts between them and the appellant William White, on the 1st of January in that year, the sum of 4,450 *l.* 2*s.* 2*d.* was due from him to them, agreed, with a view to effectuate a general settlement, to remit to him one moiety of that sum, and to release the Hopewell estate, and all other securities in their hands, from their claims, upon payment by him of the other moiety. Accordingly, by a deed, dated the 5th of March 1814, in consideration of the sum of 2,225 *l.* 1*s.* 1*d.* paid to them by the appellant White, they conveyed the Hopewell estate, slaves and premises, "subject to
 " such right or equity of redemption, if any such
 2

" there was, or then existed," unto and to the use of John Lowe and Thomas Gill, as trustees for the appellant White; and they assigned to the same trustees the 10,000 *l.* and interest, secured on the estate by the mortgage of the 26th of August 1774; the 5,200 *l.* and interest, decreed to be paid by the decree in the suit of *Campbell v. Bucknor*; the 7,000 *l.* and interest, secured by judgments; and all other securities which became vested in Messrs. Roebuck & Co. by their mortgage securities of the 1st of February 1777, and 1st of March 1777, freed and discharged from the said mortgages, but " subject to such " equity of redemption (if any was then subsisting) of and then affecting the said hereditaments " and premises charged with the said debts." And by the same deed, the sum of 2,225 *l.* 1 *s.* 1 *d.*, the moiety of the said debt of 4,450 *l.* 2 *s.* 2 *d.*, which remained unsatisfied, and was remitted to the appellant White, was assigned to the same trustees in trust for him.

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At the time that the appellant White thus terminated his transactions with Roebuck & Co., he entered into a fresh arrangement with Burton under these circumstances :—he had paid interest from the 1st of January 1811 to the 1st of January 1812; on the mortgage to Burton, in pursuance of the agreement of the 9th of January 1811; but on the 1st of January 1814, the sum of 720 *l.*, the amount of two years' interest, was in arrear, and he being unable to pay it, it was agreed that it should be added to the 8,000 *l.* as principal money, and bear interest at 5 per cent. At the same time the appellant White borrowed the sum of 2,700 *l.* from John Cowell; and it was agreed, with the consent of Bur-

8th March
 1814.
 Conveyance of
 Hopewell estate to trustees to secure payment of mortgage-money to Burton, and of money advanced by Cowell.

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ton, that that sum, with interest at 5 per cent, should be secured on the Hopewell estate, and should have priority to Burton's debt of 8,720*l.* Accordingly, on the 8th of March 1814, the Hopewell estate and slaves, and the three principal sums of 10,000 *l.*, 5,200 *l.* and 7,000 *l.*, and the interest thereof, and the securities for the same, and also the sum of 2,225 *l.* 1*s.* 1*d.*, being one moiety of Messrs. Roebuck & Co.'s debt of 4,450 *l.* 2*s.* 2*d.*, which had been remitted to the appellant White, and assigned in trust for him by the deed of the 5th of March 1814, were conveyed and assigned to George Cowell and Felix Booth, upon trust, after payment of all expenses, to pay one-tenth part of the consignments and produce of the Hopewell estate to the appellant White, for his own use, and to apply the residue thereof, first, in payment of the two sums of 2,700 *l.*, and 8,720 *l.*, and the interest upon them respectively, and then upon trust to reconvey and assign all the premises to or in trust for the appellant White.

By virtue of this trust-deed, the trustees, by their agents, entered into the possession and management of the Hopewell estate, and consigned the produce of it to Cowell upon the trusts of the deed.

Wills of Burton and his acting executor.

Burton, by his will, dated the 5th of November 1814, bequeathed the 8,720 *l.* and interest, which were secured to him by the trust-deed of the 8th of March 1814, to his nephew Robert Ward, subject to the payment of certain legacies; and he appointed John Cowell, Robert Ward, and the appellant Daniel Stephenson, his executors, but Ward alone proved the will.

Ward, by his will, dated the 22d of November

1816, after giving certain legacies, bequeathed the residue of his estate to the appellant Daniel Stephenson; and he appointed him and Benjamin Hind executors, and they both proved the will.

On the 21st of January 1822, the respondents, John and Ann Parnter, filed their bill in the Court of Chancery of Jamaica (which was afterwards amended) against the appellant White, John Cowell, and the appellant Daniel Stephenson, who had been appointed the administrator, '*ad litem*,' of the estate of White the elder, and the several parties and representatives of parties claiming under the respective wills of John Bucknor and Ann Parnter, his widow. This bill stated the several matters which have been mentioned before, and charged that White the elder, and those claiming under him, or some of them, out of the rents and profits of the Hopewell estate, had been paid the amount of the mortgage of 1777, and all interest thereon, and all other sums of money which, by the decree of the 23d and 24th of August 1791, were decreed to be prior liens upon the Hopewell estate. And it prayed for a declaration that the respondents were well entitled to the benefit of the decree pronounced in the suit of *Roebuck and others v. White and others*; and that it might be ordered and decreed that Ann Parnter, by relinquishing her right and title to dower and thirds out of the estate of John Bucknor deceased became a *bonâ fide* purchaser of the annuity of 300 *l.* bequeathed to her by the will of John Bucknor. And that the respondent John Parnter, as administrator of Ann Parnter's estate, might be declared entitled to receive and be paid the same out of John Bucknor's moiety of the Hope-

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21st Jan.
1822.

Bill filed by respondents, the representatives of Mrs. P., to recover the arrears of her annuity.

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well estate and slaves, to be by him applied according to the will of Ann Parnter; and for a reference to the Master to take an account of what sums of money were then due and owing for and on account of the annuity of 300 *l.*, and the interest thereof, from time to time as the same became due; and that unless the appellant White, and those claiming under him, should admit payment thereof, the Master might be ordered and directed to take and state an account of all sums of money which might be then due on all judgments against William Bucknor, the father of John Bucknor, and against his estate, and for which the moiety or equal half part of the estate of John Bucknor was liable; and of all sums of money due and owing on the decree of the 26th of May 1774, made in the cause of *Campbell and others v. Bucknor and others*; and also an account of any monies due on the mortgage of the Hopewell estate of the 26th of August 1774. And that the Master might also take an account of all sums of money paid to or received by White the elder, or any person or persons for him or on his behalf, by the produce of the Hopewell and Spring Valley plantations, or otherwise, previous to the 4th of December 1777, the time of the sale of the Spring Valley plantation; and also of all payments made to or received by White the elder, or any person or persons for him or on his account, by the produce of the Hopewell plantation, from the 4th of December 1777 till the entry of Roebuck and Farrar as mortgagees on the 21st of May 1781; and that the balance received by him on account of the sale of Spring Valley estate might be carried by the Master to the credit of John Bucknor's moiety of

the Hopewell estate ; and that it might be referred to the Master to take and state an account of the actions and transactions of Roebuck and Farrar, from the time they entered into the Hopewell plantation until they delivered up possession thereof in 1814. And that the Master might take and state an account of all sums of money received by White the elder, or White the appellant, or by Burton, Cowell, the appellant Stephenson, or by any other person or persons claiming under securities to White the elder, or the appellant White, from the Hopewell estate. And that the Master might be directed to apply the annual balance arising from the amount of such payment, in the first place, towards the reduction of the monies which were due on the securities declared by the decree of the 23d and 24th of August 1791, to be prior to the annuity of Ann Parnter ; and that, if necessary or required, the requisite account of debts owing by, and legacies claimed under the will of John Bucknor, might also be taken. And that it might be referred to the Master to take an account of all monies due to the respondent John Parnter on account of the legacy under the will of John Bucknor, deceased, together with the interest thereon ; and that in taking such accounts the Master should be directed to distinguish and state how much of the monies was due and owing from the estate of John Bucknor ; and that upon the coming in of the Master's report, if it should appear that the demands had been satisfied which were declared by the decree of the 25th of May 1791 to be prior to the annuity, that the appellant White, Cowell, and the appellant Stephenson, and the other defendants, or some of them, might

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be decreed to pay to the respondent John Parnther, as administrator as aforesaid, whatever might be reported due on account of the arrears of that annuity ; or that in default of payment, John Bucknor's moiety of the Hopewell estate, with the slaves, stock and appurtenances, might be sold ; and that out of the money to arise from such sale, the Master should, in the first place, pay to the respondents their full costs of suit, and then the amount (if any thing) which might be reported due on the securities prior to the annuity of Ann Parnther ; and that out of the monies, the respondent John Parnther, as such administrator, might thereafter be paid the arrears of the annuity, with interest. The bill also prayed for a receiver, in the mean time, of John Bucknor's moiety of the said Hopewell estate, slaves, stock and premises.

Bill demurred to.

Answer of appellant Stephenson.

The appellants White and Stephenson, and the defendant Cowell, filed separate demurrers to this bill, on the ground of multifariousness, which were overruled upon argument. The appellant Daniel Stephenson then, by his separate answer, alleged by way of defence, that there had been an adverse possession of the Hopewell estate against the heirs and devisees of John Bucknor, and those claiming under them, for forty years or thereabout, under a judgment in ejectment : that Ann Parnther joined with John Bucknor, her former husband, in the mortgage to White the elder, of the fee-simple of the Hopewell estate, of the 26th of August 1774, and thereby barred her right of dower out of that estate : that Ann Parnther or her representatives had not at any time thereafter any claim on the estate, or against the representatives of White the elder : that there

was not any fund arising from the Hopewell estate, during the lifetime of Ann Parnter, that was applicable to the payment of the annuity of 300*l.* a year; the Hopewell estate and premises during the whole of that period being vested in, and in the possession of White the elder, and those claiming under him, under a prior title: that although the complainants claimed under a mortgage, yet they did not by the prayer of the bill offer to pay or allow what might be found due to the representatives of White the elder, and those claiming under them, in respect of the security stated in the bill.

The appellant White, and Cowell, put in a joint and several answer, and relied on the same grounds of defence as were alleged in the appellant Stephenson's answer; and they also alleged that the annuity of 300*l.* a year was a mere pecuniary bequest, and not charged on any real estate whatever, and payable posterior to the testator's debts, out of his personal estate only. And the appellant White further stated that he had, in a schedule annexed to his answer, set forth an abstract statement of the annual crops, receipts and payments, and annual balance thereof, from the Hopewell plantation, as well in the island of Jamaica as in Great Britain, from May 1781 to the 30th of April 1822, so far as he had been able to make out the same from the account furnished by Messrs. Roebuck & Co., who were in possession of the estate under mortgage from White the elder to them from the month of May 1781 to March 1814, or thereabout, when the deed of trust of the 8th of March 1814 was executed; and so far as he had been able to make out the same from the accounts furnished him by John Cowell, as con-

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Answer of
 appellants
 White and
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signee of the plantation, under the trust-deed, from the 8th of March 1814 to the 13th of April 1822; and that he had also in the schedule inserted a statement of the several principal sums due to White the elder, from the Hopewell estate, from the month of December 1773, inclusive, and interest thereon at 6 per cent currency; in which statement he had made rests from time to time, when any money appeared to have been received from or on account of the said plantation in part payment and satisfaction of the demands of White the elder thereon, and as such rests had given credit for the several sums for which credit appeared then due to the said plantation, and deducted the same accordingly; and that at the foot of the account there appeared to be then due from the said plantation, on the account aforesaid, for principal money, the sum of 32,573 *l.* 7 *s.* 7 *d.*, and for interest on balance the sum of 15,861 *l.* 14 *s.* 11 *d.*

Disclaimers
 by heirs and
 devisees of
 John Bucknor.

15th Feb.
 1828.
 Decree and
 appeal.

All the other defendants put in their answers to the bill; and amongst others, the heirs and devisees of John Bucknor, who disclaimed all interest in the mortgaged property. On the 15th of February 1828, the cause was heard; and the Chancellor's decree of that date declared that the annuity instead of dower, given to Ann Parnter, by the will of her first husband John Bucknor, was a lien and charge on John Bucknor's moiety of the Hopewell estate, slaves and stock; and that the respondent John Parnter, the administrator of Ann Parnter, was entitled to be paid all monies due on account of such annuity, next after the prior incumbrances, if any, affecting the same, in conformity with the decree pronounced in the cause of *Roebuck and others v. White and others*, in the year 1791; and it was also

ordered and decreed that it should be referred to the Master to take an account of what was due and owing in respect of the annuity of 300 *l.*, from the time of the death of John Bucknor up to the death of Ann Parnther; and to inquire and report whether any and what incumbrances upon the aforesaid premises, prior to the said annuity, were then subsisting, and the amount of them. And it was also ordered and decreed that it should be referred to the Master to take the several other accounts and make the inquiries prayed by the bill.—From this decree the present appeal was instituted.

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Roupell and Rennalls, for Appellants :—

Mrs. Parnther, by joining in the execution of the mortgage-deed of 1774, in the manner directed by the Jamaica statute of the 33d Charles the 2d, cap. 22, abandoned all her title to dower out of the Hopewell estate. On account, however, of her having thus joined, her representatives have instituted this suit, and assert a right to overhaul all the incumbrances on the estate, in order to let in her claim as a purchaser for a valuable consideration of an annuity of 300 *l.* a year. This annuity was given in lieu of dower to her, by the will of her first husband, Mr. John Bucknor; but although he has expressly charged the legacies to his daughters on his real estate, there is not a single expression in this will to show that it was his intention to charge the annuity to his wife on it. The circumstance of the annuity being given her in lieu of dower does not distinguish it from an ordinary bequest of an annuity.

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Lord Wynford :—

Will it not be a question in this case, whether the effect of Mrs. Parnther's joining in this mortgage would be to bar her of her right to dower out of the estate altogether, or to bar her of it only as against this particular incumbrancer?

Burge, Counsel for Respondent :—

We shall certainly contend that it had the effect of barring her dower only as against the particular mortgagee, on the authority of *Innis v. Jackson* *.

Counsel for Appellants, in continuation :—

In that case the property which the wife joined in conveying to the mortgagee by a fine, originally belonged to her ; here the estate to which she barred her dower was the inheritance of her husband. If the husband had other estates, out of which she was entitled to dower, she might have elected to take this annuity in lieu of it ; but we say, that at this distance of time her representatives have no right, on any pretence, to call upon mortgagees to open accounts which have been so long closed, or to yield up estates of which they have been so long in possession.

If this bill is to be considered as an original bill, the relief it prays for cannot be granted consistently with the decisions that regulate the practice of our courts of equity. It prays for an account from the respondents as mortgagees, and a sale of the estate ;

* 1st Bligh, 186.

but there can be no sale of an estate in mortgage without the consent of the mortgagee; the only relief the respondents could have been entitled to ask for (if they were to be held entitled to any) would have been a redemption of the mortgage; *Troughton v. Binks* *; they however make no offer to redeem in their bill; they only ask for an account and sale, and a bill for an account can never be converted into a bill to redeem. *Mortimer v. Cooper* †. A statement is, indeed, contained in this bill, “that the appellants “have been paid their mortgage money and interest “out of the rents and profits;” but that is a mere assertion, unsupported by any proof on their side, and fully answered by the schedule annexed to the appellant White’s answer, which shows an enormous and overwhelming balance of 48,500*l.* against this estate, all of which must be paid, before the respondents can claim to receive a single shilling of this annuity. If this bill is to be considered as a bill to carry a decree into execution, it then would have been necessary to have satisfied the Court, that the decree it sought to render operative, was a fit, and proper decree to be carried into execution. *Hamilton v. Houghton* ‡. The Chancellor in Jamaica, however, considered himself bound by the decree of 1791, whether it was erroneous or not, because the appeal against it had never been prosecuted. This is a doctrine which cannot be supported in an English court; and if the decree of 1791 is proved to be erroneous, we are confident your Lordships will not order it to be carried into execution.

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The declaration contained in that decree “that

* 6th Vesey, 575. † 2d Russell, 216. ‡ 2d Bligh, 186.

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" Mrs. Parnter was a *bond fide* purchaser of this " annuity of 300 l. a year," was alike uncalled for by the shape and prayer of the bill in the suit in which it was made, and unsupported by any analogy to the proceedings of the Courts of Equity here. That suit was instituted by subsequent mortgagees against Mr. White the elder, for a foreclosure of his interest in the estate; Mrs. Parnter was made a party to it in two characters: first, as the executrix of her husband's (the mortgagor's) will; secondly, as an annuitant claiming under that will. Her most prominent character was that of executrix, and as such she was bound to protect the interests of all his creditors and other claimants upon his estate: instead of doing so, she set up a claim for this annuity, and got a decree in her favour in this suit, to which no creditors of her late husband were parties to defend their rights. Had she filed her bill as an annuitant under her late husband's will, or as executrix against his creditors, the Court might have entered into the question, whether she might have set up this annuity against them or not; and it ought not to have made a decree in her favour to the prejudice of any one, even of the simple contract creditors of her husband, for in the colonies lands are subject to the payment of simple contract debts. She might, indeed, have set up her annuity, as it was given her in bar of dower, against volunteers claiming under her husband, or against the creditors of the particular estate out of which her right to dower existed; but she had barred her right to dower out of this estate. If she was not entitled to any dower out of the estate, how could she be entitled to a recompense for dower out of it? In fact, she took this

annuity as a mere pecuniary legacy, subject to her husband's funeral expenses and debts. *Blower v. Morritt* *. If this claim were tenable, what would a husband gain by his wife barring her dower?

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It is unusual for Courts of Equity to make declarations of the rights of defendants to suits; in this decree of 1791 the Court of Jamaica went out of its way to do so. It is improper to open accounts without some good reason being shown to the Court to lead it to doubt of their accuracy; by this decree the Court ordered the whole of the accounts, which had been taken previously to the month of May 1777, to be opened, without anything having been brought before it to impeach the proceedings under the former decrees. Whatever may be now asserted concerning the validity of that decree, the propriety of it was evidently much questioned at the time it was made, for it was appealed against, and the only reason the appeal was not prosecuted, was the death of Mr. White the elder; some doubts must have existed relating to it, even in the mind of Mrs. Parnther, who was the principal gainer by it, for she never did anything to carry it into effect, or to establish her right to the annuity, but she rested perfectly quiet and satisfied to the day of her death with a declaration made in her favour in a suit which was not of her own institution.

Supposing even, however, that Mrs. Parnther had a claim to be paid this annuity out of the Hopewell estate, and that this decree of 1791 was such a decree, as ought to be carried into execution, we contend that the claim of the respondents is barred

* 2d Ves. sen. 420.

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by length of time and laches. Mrs. Parnther, at the time of the passing of that decree, was a married woman; her husband however died soon afterwards, and from the period that her coverture ceased, time began to run against her demand. Her will was proved in 1794, and from that time until 1822 (a period of twenty-eight years) not a word was breathed as to this claim. The decree of 1791 too does not direct a certain sum to be paid to her, but an account to be taken, whether any thing was due to her or not. We have a right to presume that the result of that account would have turned out unfavourable to her, and that she and her representatives have not previously prosecuted their claim because they knew that such would have been the result of their doing so. In *Cholmondely v. Clinton**, it was held that twenty years adverse possession was an equal bar to claims in equity as at law. The appellants, and those whom they represent, have had possession of this estate for much more, than that period. We contend too that in no case can decrees be carried into execution after the lapse of a similar period.

[Lord Wynford:—

Does not the case of *Mildred v. Robinson*† decide that decrees in equity are not subject to the statutes of limitation?]

Counsel for Appellant, in continuation :—

Courts of Equity act in analogy with the statutes of limitation. In *Smith v. Clay*‡ the Court refused

* 1st Jac. & Walk, p. 1. † 19th Ves. 587.

‡ 3d Brown C. C. 668.

to review a decree which had been passed more than twenty years previously, and generally recognized the doctrine, that twenty years was a bar to any proceedings upon a decree which had not been brought before it within that period. This doctrine too applies more especially in the colony from which this appeal comes.

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In the year 1788, a law was passed in Jamaica to limit the right of enforcing the execution of judgments: twenty years silence under a judgment by this statute is a presumption of payment. There is a similar statute in Ireland, but there is not one in England. The Irish statute on this subject, the 8th Geo. 1st, cap. 4, sec. 2, enacts, "That if
 " any person shall commence any suit in law or
 " equity for recovery of any debt due by single
 " bill or bond under hand or seal, or by judgment,
 " statute staple, statute merchant or recognizance,
 " which shall be due or payable for twenty years
 " before action brought, the defendant may plead
 " payment in bar of action, unless the plaintiff, or
 " those under whom he claims, hath or have com-
 " menced or prosecuted some action for the reco-
 " very of such debt, or shall prove that some
 " interest or money have been paid, or other satis-
 " faction made on account thereof, within twenty
 " years before such action commenced." This statute was quoted in the case of the *Earl of Egremont v. Hamilton**, where a bill, in 1799, to have the benefit of a decree in 1740, was dismissed, the suit having abated by the death of the defendant in 1771, and by that of the plaintiff in 1774.

* 1st Ball & Beattie, p. 517.

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Now the statute in Jamaica goes further: the 29th Geo. 3, cap. 13, sec. 4, enacts, "That from
 " and after the 1st of January 1789, all bills,
 " bonds and mortgages whatsoever, and all judg-
 " ments and every other writing or writings obli-
 " gatory whatsoever, which had already been, and
 " should thereafter be given, made, or obtained,
 " whereon no payment had been nor should be
 " made, or which had not or should not be legally
 " demanded, within the space of twenty years from
 " the time they respectively became or should be-
 " come due, or from the last payment thereon,
 " should be, and the same and every of them were
 " declared thereby null and void to all intents, con-
 " structions and purposes whatsoever, any law, cus-
 " tom and usage to the contrary thereof in anywise
 " notwithstanding." In the present case there is a
 decree made in 1791, and no attempt made to carry
 it into execution for a period of thirty-one years:
 it must therefore be by this statute a nullity. The
 interpretation put upon the Irish statute by Lord
 Redesdale, in an Irish court, ought to be a guide in
 some measure as to the interpretation that ought to
 be put upon a Jamaica statute on a similar subject.
 The cases where the subject was brought before
 him were *Bond v. Hopkins**, and *Hovenden v.*
Lord Annesly†. In the latter case Lord Redesdale
 says, "I think it is impossible not to see that Courts
 " of Equity have constantly guided themselves by
 " this principle, that wherever a legislature has
 " limited a period for law proceedings, equity will,
 " in analogous cases, consider the equitable rights

* 1st Scho. & Lefroy, 422.

† 2d Scho. & Lefroy, 632.

“ bound by the same limitations.” He then quoted with approbation the decision of Lord Macclesfield in *Hollingsworth’s Case**, that although the statutes of limitation speak nothing of bills in equity, yet they are construed to be within it. And further on in the case, page 636, he declares his opinion in these words:—“I think it has been so laid down, that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years: thus, in the case of redemption of a mortgage, if the mortgagee has been in possession for a great length of time, but has acknowledged his possession was as a mortgagee, and therefore liable to redemption, a right of action accrues up to that acknowledgment. But if not pursued within twenty years, it is like the case of a promise of payment beyond the six years, and *non assumpsit infra sex annos* pleaded; and so in every case of an equitable title (not being that of a trustee whose possession is consistent with the title of his claimant), it must be pursued within twenty years after his title accrues.” So that, according to the doctrine of Lord Redesdale, if there had been an account taken in pursuance of the order of 1791, a Master’s report setting it out, and a decree thereupon ordering the absolute payment of it, still, if proceedings had not been taken within twenty years, the right of the respondents would have been barred.

In England mere length of time has been held a bar, though the estates sought to be recovered had been got possession of by very unfair means. *Bon-*

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* 1st P. Wms. 742.

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*ney v. Ridgard**. In *Beckford v. Wade*† (which was heard on appeal from Jamaica in this court), Sir William Grant decided the case by analogy to the Jamaica statute of limitation, 4th Geo. 2, cap. 4, sec. 1, which converts seven years possession under a deed or will into a positive absolute title against all the world, and even against his Majesty and his successors. We submit therefore that this decree of 1791 is at present utterly void, and a mere nullity, according to the law of England and the law of Ireland, and more particularly according to the law of the country where the transactions all took place, and by the law of which they ought to be regulated.

Supposing too this mortgage to be redeemable, and that the respondents made an offer to redeem it in their bill, they ought to have shown a right to redeem, and that they had not forfeited that right by not previously coming forward. *James v. Biou*‡. In that case the mortgage was redeemable, but the plaintiff having no right to redeem it, the bill was dismissed with costs. If now, however, even the devisees of Bucknor were to claim the equity of redemption of this estate, the possessors of it might reply they had lost their right to ask for it by lapse of time, and that the property had now become irredeemable.

It will perhaps be contended, on the other side, that as the sums of money secured by the deeds of July 1775, and February and March 1777, were assigned by the deeds of 1795 and 1814, the mortgages were considered by the appellant White

* 1st Cox, 145. † 17th Vesey, 87. ‡ 2d Sim. & Stu. 600.

as still existing, and that he continued to look upon himself as a mortgagee. If it was possible, however, to make conveyances which could not prejudice the rights of any of the parties to them, it was done in this case. The estates and slaves were conveyed "subject to such right or equity of redemption as the same were subject to (if any such right or equity of redemption then was or then existed)." The assignment and conveyance of the equity of redemption was so guarded by the introduction of the words "if any," that it could not prejudice White. *Hardy v. Reeves**. The appellant White always considered, that he had an irredeemable interest in the whole estate; for although his uncle had become the purchaser of half of the property in 1786, and consequently one half of the original mortgage debt was merged and extinguished, he yet assigns the whole of the sums formerly secured on this estate in the deed of the 8th of March 1814. They were charges on the moiety of the estate, but he chose to keep them up as a charge on the whole, in order perhaps to distinguish his real and personal property. It is very common for a tenant for life, or a tenant in tail, when he pays off incumbrances, to have them assigned to a trustee for him. It is not so usual for a tenant in fee to act in this way, but he has a right to do so if he pleases. No argument can indeed be drawn from these deeds that any of these sums are regarded as existing incumbrances, because Mr. White assigns sums together with them that were indubitably his own; for the 2,250*l.* which he had paid off, and indeed a moiety of the other sums, must have belonged to him. The representa-

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* 4th Vesey, p. 480.

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tives of Mrs. Bucknor, who died in 1794, cannot claim a better equity than she herself could have done if she had been alive. We submit that if she had been so now, she would have had no claim, and we trust that this decree of 1828 will be reversed.

Burge and Bird, for Respondents :—

If these mortgagees had, in obedience to the decree of 1791, submitted themselves to the ordeal of a Master's office, not a shilling would have been found to have been due to them. This is not the first attempt which has been made by a mortgagee in possession to make the mortgaged estate his own, and where he has been forced by the intervention of a Court of Equity to disgorge the rents and profits which he has continued to receive from the estate long after his mortgage money, both principal and interest, has been paid and satisfied.

The decree of 1791 was made in a suit which brought all the parties before the Court, and showed what their interests were. Mrs. Parnter had not disturbed a transaction for the sale of the Spring Valley property, out of which she had a right to dower without dispute. She had joined in the mortgage of the Hopewell estate, and was entitled to her dower out of the equity of redemption of it; and on these accounts she claimed to be entitled to her annuity of 300 *l.* a year as a purchaser for a valuable consideration. No claim could be more just and equitable according to the doctrine laid down by Lord Hardwicke, in *Blower v. Morritt* *. Her right to dower out of the equity of redemption of the Hopewell estate was unquestionable; her

* 2d Ves. sen.

joining in the mortgage of it had no greater effect than if she had levied a fine of it for the same purpose in England. After the mortgage was satisfied, her claim to dower out of the estate remained perfectly good. *Innis v. Jackson**. When she got rid of the mortgage she stood exactly as she did before the mortgage was made.

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One of the grounds on which the decree in this suit is attempted to be impeached, is that it prays to open accounts from the year 1771. When a bill was filed to obtain the benefit of a former decree, and it showed an estate in the hands of a mortgagee, all the rents and profits received by him, all the consignments coming into his hands, and this state of things going on for a long period of years after one half of the debt had been actually paid, the Court below could not act otherwise than in the way it did.

[Lord Wynford:—

In the first suit it was referred to the Master to take an account of the sums due on the mortgage. In the decree of 1791, the Master is directed to inquire again into the same account. How does it appear there was anything omitted in the first inquiry?]

Counsel for Respondent, in continuation:—

All the proceedings in a cause in Jamaica are kept in the register's office. The Master's report in the first cause would have been before the Master in the inquiry directed by the decree of 1791: he would have seen the specific sums allowed by the former Master in the account taken before him, and

* 1st Bligh, 186.

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he would also have seen, that there were other sums received by the mortgagee, and not accounted for.

It has been too alleged, on the authority of *Hamilton v. Houghton**, that the bill in this case could not be supported, because it was filed to carry into execution an erroneous decree *Hamilton v. Houghton* warrants no such proposition. In that case, when Lord Eldon expressly put the question "Whether the assignees could not have the benefit of a decree that was erroneous," Lord Redesdale observed that it was "the decree of a creditor, and taken upon sequestration *pro confesso*. In such a case it was the business of the party taking the decree to see that it was right." In *Hamilton v. Houghton*, the decree that was sought to be carried into execution was clearly erroneous according to the judgment of Lord Eldon, because it was made in a suit defective for want of proper parties. But this suit was not defective for want of parties; all the creditors of Mr. J. Bucknor were represented by Mrs. Bucknor, and if not by her, by Mr. Dunn. The decree made in it was valid in form, valid in substance, valid in point of merits; and if it was not so, we cannot, consistently with any principle of justice, enter into the consideration of its merits, when the parties have never brought an appeal against it. If a decree is erroneous you must appeal against it; but if you do not bring your appeal, you cannot have its merits reviewed at the distance of twenty years from the time of its being pronounced, and this was the principle of the decision of Lord Camden in *Smith v. Clay*†.

* 2d Bligh, 169.

† 3d Brown C. C. p. 638.

The next point offered to the Court, is that the mortgage is irredeemable, on account of the length of adverse possession by the mortgagee. To support this position the appellants were bound to show the court, 1st, that the case was within the statutes of limitation; 2dly, that it was not taken out of the operation of those statutes by subsequent equities. In *Palmer v. Jackson* * it was held, that although a mortgagee had been in possession forty-seven years, there were equities existing during that time, which defeated the bar opposed by the Irish statutes of limitations to the persons claiming to redeem. In the appellants' answers they did not insist upon the latter ground; had they done so, there were circumstances that would have satisfactorily accounted for the respondents not having sooner availed themselves of the decree of 1791. They themselves were infants, and there was no administrator to Mrs. Parnther to protect their rights. These facts would have been proved by evidence if there had been any occasion for it, but from the way in which the appellants' answer was framed, it was unnecessary.

It cannot be disputed that wherever a mortgagee keeps alive the original mortgage debt as a charge on the property, for whatever purpose he may chose to do so, he recognizes the existence of the mortgage security, and is liable to be treated as a mortgagee. *Hansard v. Harvey* †.

The transactions of 1796, of 1811 and 1814, however (say the Counsel on the other side, by way of anticipation), were between the mortgagee and other parties, and therefore were no recognitions of

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* 5th Brown P. C. 281.

† 18th Vesey, 455.

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the mortgage, that the mortgagor could take advantage of. Upon this point Sir William Grant thus expresses himself in *Hansard v. Harvey*: "It is
 " however said for the defendants, that these acknowledgments made in dealings with third parties
 " are totally foreign to the mortgagor, and that the acknowledgment, which is to operate so as to
 " bar the objection from length of time, should
 " be an acknowledgment arising out of some
 " transaction directly between the mortgagor and
 " mortgagor. How far that might be the more
 " reasonable rule I shall not now examine, but certainly it is not the established one." If there is any law in the decision of Sir W. Grant, it exactly meets this case. Both the deeds of the 5th and 8th of March 1814 allude to, and mention the original mortgage of 1774, both of them assign the specific sums secured upon this estate, and both of them convey the estate subject to the equity of redemption of the mortgagors.

There is as clear a recognition in them of the mortgage debt as is possible, on the principles laid down in *Hansard v. Harvey*. It has been said that a tenant in fee may like to keep alive a charge upon his estate, as is constantly done by tenants for life and in tail. A tenant for life or a tenant in tail, when he pays off an incumbrance with his own money, is naturally desirous of keeping it alive as a charge for his own benefit, because he has only a partial interest in the estate, and if he does not do so he lays out his money for the good of those who are to succeed to him under the entail; but for what earthly purpose should a tenant in fee, who is the absolute owner of the property, who may charge it

or encumber it, at any time and in any manner that ne pleases, wish to keep up a mortgage debt as a subsisting charge upon it? We care not, however, what the object in the present case may have been. If the charge is kept alive, it is so kept not for the benefit of the person who keeps it alone, but for the general benefit of all persons having an interest in the property. If the mortgagee recognizes the mortgage debt as a charge existing on the estate, he recognizes his own character as a mortgagee, and he recognizes the mortgage deed by which the debt originally became charged. By these deeds the debt was recognized in 1814. Our bill was filed in 1822, and therefore within the proper period, and the mortgagee has not made himself, as he designed, the absolute owner of the estate.

What then becomes of the next proposition ; that supposing the mortgage to be redeemable, our title to redeem is barred by our own laches? When the mortgagee is once dispossessed of his absolute ownership, he is dispossessed of any right to dispute the claims of those, who come forward under the original mortgagor ; he is only a stakeholder for those, who claim the right to redeem the estate. The representatives of the original mortgagor are before the Court ; they do not say in their answer that our claim is barred. Mr. White has admitted that he is a mortgagee : if there is anything due to him, he has the right to be paid before us, but he has no further right. A mortgagee can only defend his possession on the ground of securing the payment of his mortgage debt ; when that is paid, he is a trustee for those who have the right to the ownership :

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even when it is unpaid, he is a trustee for those who have the right to redeem.

The decree in 1791 was made in a suit in which the parties under whom Mr. White claims were complainants ; the party whom we represent was a defendant. It is needless to make any observations drawn from the Jamaica statute of limitations. It has been never held to apply to decrees, or to any other than the specific securities named in it. What has been said by Lord Redesdale only comes round to the old doctrine, that persons shall not be permitted to prosecute stale demands, either in law or in equity, who were competent to prosecute them when fresh. Time only operates in a court of equity to raise a presumption that a claim has been satisfied, but it is liable to be rebutted by contrary facts. The deeds of 1814 clearly rebut that presumption in the present case. The party applying to redeem in *James v. Biou* * had no right to do so. That case has no application.

The last argument on the other side, is that we made no offer in our bill to redeem. The bill charges that the debt is not due. The decree provides, that if anything is due it shall be paid out of the proceeds of a sale, which is in conformity with what they prayed in their suit in 1786.

There are three facts in these accounts made out by mortgagees in possession, (who ought to have regularly, according to the law of Jamaica, to have filed them every year in the secondaries' office,) which clearly show there is no pretence for saying that

* 2d Sim. & Stuart, p. 600.

anything is due: 1st, all the debt and all the contingent expenses of this estate are charged on the moiety from which we claim our annuity, although the other moiety belongs to Mr. White by purchase from Thomas Bucknor; 2dly, Commission is charged, which a mortgagee in possession has no right to charge; 3dly, Though all the mortgages and charges on the estate were in currency, yet the whole of the consignments are charged against us in sterling. This is contrary to practice, and in the Master's office in Jamaica the difference of the exchange between currency and sterling is always carried to the mortgagor's side of the account. The Court of Chancery in Jamaica knows well how to deal with a case like this; and we hope that this Board will meet the merits of the case by affirming the decree of the Court below, and sending the parties into the Master's office, where there is no doubt but full justice will be done to them.

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Roupell, in reply:—

There is no proof that Mrs. Bucknor was entitled to dower out of the Spring Valley estate. Mr. J. Bucknor might have only had an equitable interest in it, out of which she could not have claimed dower; and although she was a party to the suit in which the foreclosure was made, she put forward no claim to it. The inference from the facts is all the other way from the supposition that she was so entitled; and if she was not, she could not be considered in the light of a purchaser of the annuity for a valuable consideration.

Mrs. Parnther was made a party to the suit instituted by Roebuck and Farrer in 1796, because

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she claimed some interest out of the equity of redemption of the mortgage they sought to foreclose. What that interest was, to them was immaterial. Her claim was against the three sons of J. Parnther, who inherited the equity of redemption. The decree in that suit proceeded to declare her rights, and therefore we contend it cannot be supported. In cases of construction of wills, it is proper indeed that Courts should declare the rights of defendants as between each other, but this ought never to be done in cases which depend upon facts. How can co-defendants enter into proofs against each other? Even the answer of one of them cannot be read as evidence against another, and there is no possibility of their joining issue. Lord Eldon, in a case before him of *Coleman v. Smithies* (which has not been reported), declared his opinion, that a Court could not make any declaration of the rights of defendants.

Burge interposed :—

This case had not been mentioned in the opening ; and he prayed to refer the Court to *Chamley v. Lord Dunsany*, 2d Schoales & Lefroy, p. 710 and 718, in contradiction to the principle laid down in it.

Roupell, in continuation :—

This decree of 1791 first makes a declaration of the right of a defendant, which is not prayed for in the bill, and then proceeds to open accounts which had been taken in the Master's office in a former proceeding. Now, in order to obtain a decree to open accounts, a special case ought to be stated to

the Court. To-day, indeed, many causes have been stated in argument why these accounts should have been opened. Fraud and omissions, so glaring and apparent as well to justify such a course, have been insisted on ; but when we look at the pleadings in the suit nothing at all of the kind appears to have been either stated or proved, and the decree stands utterly unfounded on any allegation in the proceedings.

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If a party comes into a court of equity, and prays to revive a decree, he must show that decree to have been good ; the proceedings in the suit in which it was made may be inquired into, and the merits of it examined (*Harrison v. Faulkner**). Such a course is particularly desirable with regard to the decrees of courts constituted as those in our distant colonies are. Men of high honour and strict integrity, but brought up in a way not very well calculated to acquaint them with legal principles, are there called upon to decide the most difficult questions of law and equity, and it is fortunate, that there is this Board of Appeal to correct their unintentional errors.

It is perfectly settled that twenty years possession by a mortgagee is a bar to a redemption. It lies upon the person applying for a redemption to show some special circumstances to prevent the length of possession from having that effect. *Barron v. Martin* †. In this bill of 1822 there is not a single special charge or allegation to account for a lapse of time, which equally in equity and at law is a bar to the respondents' claims. The only ground on which they found them is the ordinary allegation, that the debt has been paid out of the rents and

* 2d Bligh, 170.

† 19th Vesey, 332.

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profits, which is introduced in every bill to redeem, and which would have been inserted equally had it been filed only two or three years after the mortgage had been contracted. The Court ought to take into its consideration the intricacy of the accounts, and to presume them settled when they have for so long a time been uninquired into. *Sherman v. Sherman* *.

The accounts which have been kept by Mr. White are not accounts which have been kept by him as a mortgagee. It is not every account that is kept that will constitute a man a mortgagee. A purchaser of an estate may keep an account of the money he has expended, and of all the expenses of the estate, in order to tell at a stated period of time whether his purchase has been profitable or not; and if so, to what extent. As to the circumstance of the whole of the contingent expenses being charged together in this account, it furnishes the strongest argument that Mr. White considered the whole estate as his own, and treated it as such. If he had considered one moiety as not his own, he would have kept the charges distinct as to that. Twenty years possession by a mortgagee is *prima facie* a bar to the right of redemption. It lies upon the mortgagor to show any circumstances preventing the possession from having that effect. *Barron v. Martin* †. Here the only grounds, the respondents have to go on to answer our long possession, are these accounts, and these accounts are such as every prudent man would have kept, if there had been no pretence of a mortgage at all. Under all these circumstances, when there is no offer in their bill to pay us

* 2d Vernon, 276.

† 19th Ves. 331.

what is due to us if we are declared to be mortgagees ; when, from the length and intricacy of these accounts, it will be impossible, if we are sent to the ordeal of a Master's office, ever to get through it ; when there is nobody to redeem, and the only aim is to force us to a compromise, we hope your Lordships will allow this appeal to be successful.

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Lord WYNFORD:—

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We shall always proceed with the greatest caution, when we doubt whether the judgments of colonial Courts can be supported ; because we feel, that by rashly reversing decisions the course of justice is unsettled, and confidence in its administration is destroyed. This observation will account for our having so long deliberated on this case. We were reminded by the bar that the Chancellor of Jamaica is not a professional man. The Chancellor of Jamaica may however avail himself of the assistance of the Chief Justice of that island, who is a regularly educated English barrister. In England the Chancellor (who is always one of the most eminent lawyers) sends to Courts of Law for their opinion on cases which he is about to decide ; and when it is more convenient, requires the attendance of some of the Judges to sit with him in Chancery to hear the arguments of Counsel, and to give him in open court their opinions before he pronounces his decision. Most men are disposed to think so well of their own cases, that a decision against them by the most experienced and approved Judges seldom convinces them, that they are in the wrong. An adverse judgment, even if it be right, cannot fail to provoke an appeal when such a judgment is pronounced by a

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person known not to be disciplined in the study and practice of the law. Whatever be the ultimate event of an appeal, it is injurious to both parties by the expense attending it, and still more so from the unsettled state in which it leaves the affairs of families. If the Governors of the colonies have not been in the habit of availing themselves of the assistance of the Chief Justice, or any other Judge, who is an English barrister, within their jurisdiction, it cannot be too strongly recommended to them to require such assistance, and that it should be given to them in open court. This practice would often obviate the necessity of an appeal, and always abate the inclination of the parties to apply for one.

An attempt has been made to prevent our getting at the merits. Such attempts seldom succeed here. This Board is not fettered by the technical difficulties which at present but too often defeat justice in other tribunals. It has been ingeniously insisted by the Counsel for the respondents that the Court in Jamaica was, in the year 1828, bound to carry into execution the decree of 1791, and had no authority to examine whether that decree was right or wrong; but that decree could not in any way be considered as conclusive on the question now to be decided. The respondent never could have carried into execution that decree, or received the arrears of his annuity by virtue of it. That decree was obtained by the mortgagees, and the only use that the respondent could make of the declaration contained in it, "that this annuity was a charge on the land," was to prevent the mortgagees from getting a foreclosure until what was due on the annuity was ascertained and paid. I do not agree with the Counsel for the

appellants, that the Court could not upon that bill (if the annuity was a charge upon the land) direct that such an inquiry should be made; because, if the annuity was a charge on the land, the mortgagees were not entitled to a foreclosure until the estate was properly discharged of this incumbrance: but when the mortgagees gave up the suit in which this decree was pronounced, if the respondents, or those whom they represent, had intended to have prosecuted their claim for this annuity, they should have filed a bill for that purpose against the proper parties. On the hearing on such a bill, the decree of 1791 would have been used only as an authority to influence the opinion of the Court in favour of the claim, but not as a decree binding the authority of the Court, and which it was bound to carry into execution; but if that decree had been pronounced in a suit instituted for the recovery of this annuity, a subsequent Court ought not to have carried it into execution without examining whether it was such a decree as ought to be executed. Those who appeal to a Court of Equity for its assistance must show the Court that they are justly entitled to the assistance which they ask. Would it be consistent with this principle to require a Court blindly to execute a decree, whether it be right or wrong, just or unjust? Our opinion upon this point is supported by that of two of the most eminent Equity Judges that ever adorned the bench. Lord Redesdale, indeed, upon a case before the House of Lords*, used the words quoted by the learned Counsel for the respondents, "That the decree was a decree taken *pro confesso*,

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* Hamilton v. Houghton, 2d Bligh.

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“ and it was the business of the party who drew it “ up to see that it was right.” The same noble Lord, however, when he pronounced his final opinion, did not advert to this circumstance, but expressed his entire concurrence with Lord Chancellor Eldon, who had in the broadest and most unqualified terms stated, that it was the duty of Courts of Equity to seek into the merits of decrees that they were called on to carry into execution, and not to enforce such decrees as were erroneous and unjust.

The learned Counsel for the respondents has complained of the eagerness of mortgagees to convert themselves into absolute owners of estates without paying their just value. The numerous clients who consulted that learned Counsel were, I have no doubt, completely protected against any such attempts. If the mortgagor has common prudence, he will take care that the debt does not by an accumulation of unpaid interest become equal to the value of the estate, and then he can always pay it off by a sale, and so secure any surplus for himself. He is surely sufficiently protected against any sudden proceedings on the part of the mortgagee, when, if he pays interest within twenty years, or if the mortgagee being in possession during that period acknowledges that he holds the estate as a mortgage, or treats it as a mortgage by conveying or otherwise dealing with it as such, he is entitled to an account of the proceeds of the estate ; and if these have discharged the debt, or he is able to pay what remains undischarged, he may have his estate restored to him.

From the terms of the deeds by which the mortgagees in this case conveyed away, and again took back their interest in this estate within twenty years

before the filing of the bill in 1822, the heirs of the mortgagor might have had an account against the mortgagees, and if the debt was paid they might have had the estate reconveyed to them. Their indifference as to what becomes of the estate shows that they think that it is swallowed up by the mortgage, and irrecoverably gone from them. If this be so, what claim could the annuitant, a legatee of the mortgagor, ever have had against this property? The decree of 1828, following that of 1791, declares that this annuity, being given in lieu of dower by the husband of Ann Parnter, was a charge upon the Hopewell estate, standing in the same degree of preference as the dower for which it was substituted. There would be some difficulty in making out any right to dower that Ann Parnter ever had. The estate was incumbered when she married: by joining in the mortgage for 10,000*l.*, and executing a deed in the manner prescribed by the Jamaica statute for barring dower, she relinquished her right to dower as far as it affected that debt; by consenting to the sale of the Spring Valley estate, and never at any time setting up any claim to dower upon it, we must take it for granted that for some reason or other she was not entitled to dower on that property. If Mr. Bucknor was indebted at the time of her marriage with him, it is probable that there were plenty of mortgage terms in existence, and that the incumbrancers took care to protect themselves against any claims of dower by getting assignments of some of these terms. Besides, at the time of her husband's death, in 1775, the estate was charged with 22,200*l.* of principal debt that had a priority before dower, and there was an accumulation of interest upon this

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debt; but if a widow elects to claim an annuity under her husband's will, instead of dower, she takes the annuity as a legatee, and waives her claim to the preferable lien that she had on her husband's estate for her dower, and she is not entitled to be paid her annuity until every debt on her husband's estate has been fully satisfied. The Courts in Jamaica were not justified therefore in directing that this annuity should be paid before any of the debts of the testator, whenever contracted.

There are many other objections to these decrees, which have proceeded from this mistake, in considering that she was entitled to the same degree of preference for her annuity as she would have been for her dower, which it is not necessary for me to state. The annuity did not, like her dower, originate with the marriage, which gave her an inchoate right to it from that time, which no subsequent act of the husband could defeat. Her right to the annuity was founded on an implied contract between her husband and herself, that was not completed till his death and her choosing the annuity. The debts were then all contracted. None of the creditors were parties to this contract between husband and wife, and therefore none of their interests can be affected by it; they were bound to take notice of her right to dower, but they could have no knowledge of any claim of her's to an annuity. It is most probable that a widow would not elect an annuity instead of dower, if it did not exceed in amount the income that she could derive from that dower. To allow such an annuity to stand in the place of dower would be a direct fraud on all the creditors. If it be said that it may be ascertained

by inquiry whether the annuity does exceed the value of the dower, I answer, no such inquiry is directed by that decree. An inquiry could only ascertain the value of the dower at the time that the inquiry was made; it could not show the differences between the annuity and the dower that future fluctuations on the value of the estate would occasion. If these could have been foreseen, unless the annuity were to vary in amount with the rises and falls on the property, the creditors could not be protected. Dower is a third of the actual produce of the estate. When an estate is entirely unproductive there is no dower payable. Hurricanes may destroy the crops and buildings on the property, and render it entirely unproductive until it has been restored at a great expenditure of money. The annuitant, when it is again rendered productive, may exact the arrears that have accrued during this season of calamity. Creditors cannot be affected by such bargains as these, made behind their backs. Widows must be content with dower, or trust to the solvency of their husband's estates. If Mrs. Parnter was never entitled to receive any dower during her life, which for the reasons that I have given I think she never was, no valid annuity could have been given her in lieu of it. If she had a right to dower, dower not having been assigned to her during her life, I know no proceedings by which the fruits of it could have been recovered for her representatives; but that was not what was claimed by the bill.

It is not shown, nor do I believe it could be shown, that all her husband's debts are paid, and that there was during her life, or is now, anything of his liable to the annuity in the hands of the ap-

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The construction put on the statutes of limitation is now more liberal than what it was formerly.

pellants. But if a right to any annuity or right to dower ever existed, the remedies for the recovery of either of these rights have long been lost. At law the arrears of an annuity can only be recovered for six years; and after the lapse of twenty years without payment, the annuity itself is gone. Dower can only be recovered by the widow: on her death the claim to dower is extinct.

Until lately the Judges at Westminster-hall took a narrow view of the spirit of the statutes of limitations. They considered these statutes were only intended to protect persons, who having paid their debts were liable to be called on to pay them a second time, in consequence of the loss of vouchers. Any allusion to the existing debt (although not amounting to a promise to pay it) was held to keep alive the right of action for the recovery of it. A cunning person could easily draw from an ignorant debtor just such an allusion as would satisfy the Courts, and no more, or if by chance some explanation or qualification accompanied the allusion, these were forgotten, and the allusion only was proved. It was always impossible that any one could be called to contradict the witness in support of the claim. The protection which the statutes intended to give was thus entirely taken away. The Courts of Law have now overturned the early decisions, as being contrary to the words and spirit of the Act*; and the Legislature has gone farther than

* See the late determinations in *A'Court v. Cross*, 11th Moore, p. 198, and 3d Bingham, 329, and *Tanner v. Smart*, 6th Barn. & Cress, 603, in which the earlier cases on the subject are all collected and reviewed: see also Phillips on Evidence, vol. 2, cap. 10, p. 138, seventh edition.

the Courts of Law could, by declaring that no verbal promise should prevent a claim from being barred by the statutes of limitations*.

The statutes of limitations are laws of peace and justice : when property has been so long in the possession of a family, that it has passed to the children and grandchildren of those who first acquired it, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came (never having enjoyed it) suffer but little from its loss. After a great lapse of time it is impossible to get at truth, so as to do justice upon any case. You have some documents, but you may not have all that relate to the title, and those which are lost might have explained or perhaps done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of the transaction complete and fit for a decision, cannot. These were the reasons why the Legislature passed the statutes of limitation, and they bear directly on the present case. Those whom the appellants represent have been in possession since 1781 : no one from the year 1791 to the year 1822 pretended to have any claim on the property. That the parties to the original transaction are long since dead, we know from the papers in the cause. It is most probable that all their clerks and agents are also dead ; there is therefore no one who can give any explanation of any paper that may be pro-

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* 9th Geo. 4th, c. 14.

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duced, or show under what circumstances it was written.

It has been said that there are accounts in existence, and that these accounts may be surcharged and falsified; but we have not been told by what evidence these surcharges and falsifications are to be established. It was not pretended in the Court below that the respondents were in possession of any such evidence: if they had any such, how could the appellants now be prepared to answer it? The delay that has subjected the appellants to this difficulty as to proof is entirely to be attributed to the respondents: it would be injustice to give them the benefit of a difficulty which they have solely occasioned. According to the accounts produced, and which must now be taken to be correct, because it is impossible to unravel them, there is nearly 49,000*l.* due to the appellants, a sum far beyond what this estate could ever have been worth, if the accounts give a true statement of the proceeds.

The Court of Chancery has adopted the limitations of the Courts of Law.

The Court of Chancery has adopted the limitations which have been imposed on legal remedies; and wherever a Court of Common Law will presume that a debt is satisfied, unless there be some circumstance to rebut this presumption, a Court of Equity will act on the same presumption. If nothing has been done under a judgment for twenty years, a Court of Common Law will presume that it is satisfied. If the decree of 1791 had been in a suit instituted by the annuitant, and had ascertained what was due for the annuity, we might have had to consider whether, as nothing had been done on that decree from 1791 to 1822, we ought not to presume that the debt so ascertained was satisfied. But the

decree of 1791 directs the payment of no debt, nor does it ascertain the existence of any, but merely directs an inquiry whether there be any debt or not, and the inquiry so directed was never entered upon. Such a decree cannot prolong the time allowed for the recovery of the debt.

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This claim has never been in any manner acknowledged since the year 1775 until the present moment. The annuity ceased in 1794, when the widow died, and her claim for it was never made until twenty-eight years afterwards.

But it has been said that, as the mortgagee has within twenty years acknowledged the existence of the mortgage, the mortgagor has on account of such acknowledgment a right to sue for the redemption of the estate; and that this annuitant, whose claim is against the equity of redemption, has a right, as the mortgagor does not object to it, to claim through his side against the mortgagee. If so, every legatee of the mortgagor must have the same right of insisting, that the mortgage debt is satisfied, and of calling on the mortgagee to give him an account of the proceeds of the estate from the time of the death of the mortgagor, a period of above fifty years. If creditors or legatees of the mortgagor had the right of calling mortgagees to separate accounts, every mortgagee would be liable to be ruined by the different suits that might be instituted against him; but from the principle laid down in the case of *Troughton v. Binkes**, and the cases referred to by the Master of the Rolls in his judgment in that case, I think that the mortgagor or his heirs only

* 6th Vesey, 572.

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can sue the mortgagee for an account and redemption, unless it can be shown that they and the mortgagee are in collusion to prevent creditors or legatees from recovering what is due to them from the mortgagor's property. There is no charge of such collusion in this bill, nor is there any pretence for supposing any such collusion in the present case.

We are therefore of opinion that the decree in the Court below cannot be sustained ; and we shall advise His Majesty to allow the appeal to reverse that decree, without costs, to order the Court below to direct that any costs that may have been paid under the decree shall be returned, and to dismiss the bill filed in the Court below, with costs.

ON APPEAL FROM DEMERARA.

SIMPSON, Representative of Stalker,
Welch & Milburn, and also of
Stephenson, Saltmarsh & Kynaston,
Assignees of the estate and effects
of the said Stalker, Welch & Mil-
burn } *Appellant.*

And

FORRESTER & BACH, provisional Ad-
ministrators of the estate and effects
of Joseph Cook, deceased } *Respondents.*

Dec. 3d,
1839.

ON the 6th of August 1817, Joseph Cook, an inhabitant of the colony of Demerara, and who was at that time possessed of a plantation called "Good Intent," and the slaves and stock thereon, made his will, which was duly attested, and in which, after making a bequest of 10 guilders to the poor of the colony, and desiring his funeral expenses and just debts to be fully paid and satisfied, he proceeded in these words: "I leave and bequeath to my dearly
" beloved wife, Mary Cook, the whole and every
" part of my property, real and personal, during
" her life, and at her death the said property to be
" sold, and the money arising therefrom to be im-
" mediately deposited in the Bank of England, the
" interest of which to be paid to my daughter,
" Elizabeth Knight, annually, during her life, and
" the principal wholly at her disposal at her death;
" but in case of the death of my daughter, Elizabeth

Devise of property, real and personal, after the death of the testator's wife, to be sold, and the money arising therefrom to be immediately deposited in the Bank of England, the interest of which was to be paid to the testator's daughter during her life, and the principal wholly at her disposal at her death held not to give the daughter, who was a married woman, such an absolute inte-

rest in the property, that her husband's creditors might, in a colony governed by the Dutch law, take it in execution and sell it.

It is not incumbent on an heir to accept his Legitim or pars legitima of an inheritance for the benefit of his creditors.

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" Knight, before the death of my wife, Mary Cook, " then the said property to remain at the disposal " of her, the said Mary Cook ;" and the testator then, after giving two legacies of 1,000 guilders each, concluded his will in these words : " lastly, " I hereby nominate and appoint my beloved wife, " Mary Cook, executrix, and the honourable Thomas " Cathery, as executor, to this my last will and " testament, to act in the fullest extent and manner " to carry this my will into execution ; and in case " of the death of the said Thomas Cathery, or his " absence from the colony, she the said Mary Cook " is hereby fully empowered to nominate or appoint " whomsoever she may think proper in his stead."

See ante,
 p. 107.

See Vanderlin-
 den, Instit.
 book 1st. c. 3,
 s. 8.

On the 20th of March 1818, Joseph Cook died, and on the 27th of the same month his will was duly proved by being deposited with the secretary of the colony. No *act of deliberation* was prayed or *inventory* made of his estate and effects by the persons entitled under his will. But by the law of Holland, there having been no antenuptial contract or marriage settlement made previous to his marriage, one half of his property only passed by his will, and the other half belonged to his wife as survivor.

On the 4th of February 1821, Mary Cook made her will (which was duly attested), and thereby appointed her daughter, Elizabeth Knight, her husband, H. Knight, and the honourable George M'Kenzie, esquire, her executors ; and after giving a sum of 22 guilders to the poor of the colony, she gave and bequeathed to her daughter, Elizabeth Knight, her true and lawful heir, all her property and effects of whatever nature they might be, real or personal. Thomas Cathery died in the lifetime

of Mary Cook, but she never exercised her power of appointing any one in his stead, and she herself died a few days after the execution of her will. This was duly proved, but *no act of deliberation* was prayed, and *no inventory* made out of her effects and estate: they were however taken possession of by Knight and his wife. As no antenuptial contract had been made previous to the marriage of Mr. and Mrs. Knight, no question was raised as to the moiety which passed to Mrs. Knight absolutely under the will of her mother, and became liable to the debts of her husband.

On the 6th of August 1822, four negroes who had formed a part of the estate of Cook and his wife, and had been on the 6th of August 1820 registered on oath as the property of his heirs, and who were at that time in the possession of Knight and his wife, were taken in execution, under a sentence obtained by one Ralph Cook, against Knight and his wife, and sold publicly, without any opposition from them. On the 20th of March 1823, the appellant, as agent for Messrs. Stalker, Welsh & Milburn, and their assignees, obtained a provisional sentence of the High Court of Justice of Demerara, against Knight, for the sum of 3,527*l.* 18*s.* sterling, with interest from the 27th of March 1819; and on the 19th of May 1825, he presented a petition to the President of the Court, praying for a warrant of execution against the property of Knight: his petition was granted by an order of the President bearing date the 10th of June following. On the 9th of July 1825, Knight and his wife advertised the Good Intent estate, with 40 or 50 negroes thereon, for sale by public auction, and on the 22d of August, in

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the same year, they presented a petition to the President of the Court of Justice, praying him to appoint some fit person or persons as administrators of the estate and property of Cook, the testator, for the purpose of carrying the provisions expressed in his will into execution. Upon this the respondents were, by an order of the President, appointed administrators for the purpose, and they immediately proceeded to take an inventory of the estate, and gave notice in the Gazette that all debts due to Cook should be paid to them.

In the mean time the appellant proceeded to put his warrant for execution into effect, and in pursuance of it the deputy first marshal of the colony took in execution, for the separate debt due from Knight, 33 of the slaves who were included in the notice for sale on the 9th of July, and the plantation of Good Intent, and advertised them for sale. The respondents opposed this execution on the ground that one moiety of the slaves and plantation belonged to them, as administrators of the estate of Cook, in trust for Mrs. Knight, which was not liable to the debts of her husband.

This opposition came on to be heard in the Court of Justice on the 17th of October 1825, when the Court declared it to be “just, legal and well founded, as far as regarded one undivided half or moiety of the piece of land, and 36 negroes, and as such to remain in full force and effect, with condemnation of the appellant, so far as he had levied on the said undivided moiety, to cancel and withdraw the same free of all costs, with interdiction to do the same in future, and to pay the respondents all costs, losses, &c. already suffered, or

“ further to be suffered in consequence, and with condemnation of the appellants in all costs.” Against this sentence the present appeal was instituted.

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Lushington (Dr.), and *Talfourd*, for Appellants :—

By the law of Demerara, where there is no antenuptial contract, all property that comes to the wife during her coverture is entirely at the disposition of the husband, and liable to the payment of his debts, except it is subject to a *fidei commissum*, that is (as we should term it), a trust, or condition, that after a limited time it is to revert to a third person. Vanderlinden's Institutes, l. 1, cap. 3, sect. 8. In this case there was no antenuptial contract, and Mrs. Knight, after her mother's death, took an absolute interest in Mr. Cook's moiety of the estate and negroes under the words of the will. The rules of interpretation of wills are the same in the law of Holland as they are in that of England, and indeed in the laws of all countries, because they are the rules of common sense. According to the decisions in the Court of Chancery here in similar cases it is clear, that Mrs. Knight would take an absolute interest in this moiety. *Barford v. Street*, 16 Vesey, 135; *Irwin v. Farrer*, 19 Vesey, 85; and *Nannock v. Horton*, 7 Vesey, 391; Lowndes on Legacies, p. 151. Mr. and Mrs. Knight too always treated this as an absolute property, until they began to entertain fears of an execution. They registered the negroes in the names of Mrs. Cook and themselves, and after her death they suffered four of them to be taken in execution, and sold for a debt of Mr. Knight's without any opposition. According to the

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law of Holland they did quite sufficient to adiate the estate, and it was not till they found that their whole property was likely to be taken from them for the payment of their debts that they set up a pretence of its being the wife's separate estate, and an application was made to the Court to appoint administrators to Mrs. Cook. It is a general rule both of law and equity that a man shall not be permitted to obtain credit on the fact of his being possessor of property, and that when he is asked for payment to turn round upon his creditors and say, it belongs to my wife, and you cannot touch it. But at any rate by the law of Holland no testator is able to leave away more than two thirds of his property from his children if they are less in number than five (as was the case here), and this third part (which is called the "*legitim*," or *pars legitima*), and which he is thus incapacitated from devising away, he cannot burthen with any *fidei commissum*. *Vanderlinden's Institutes*, l. 1, cap. 9, ss. 5 & 8. To this legitim therefore, even if it should be held that Mrs. Knight does not take the whole of her father's moiety absolutely, the creditors are clearly entitled; for as Mr. Cook could not in his will subject it to any *fidei commissum*, it would descend to her absolutely, and as such would be liable to the debts of her husband.

Adam (K. C.), for Respondents :—

The simple question here is, whether Mrs. Knight's property was liable to the debts of her husband. We do not dispute the general doctrine, that during coverture all the estate of the wife is liable to the debts of her husband. But we say there are excep-

tions to this rule, and that this case falls within one of these exceptions. If the will of Cook is to be considered without adverting to the cases which have been cited from the reports of the Court of Chancery in England, there can be no doubt that he meant his daughter to have the income arising from the property he left her for her life, independently of her husband, and much more so of the creditors of her husband. He was doubtless well aware of the state of his son-in-law's affairs, and his intention was to provide for his daughter, so that she might not want during her life, and to give her a power of disposition over his property at her death. If he had intended to confer on her an absolute interest in it, he would not have ordered it to be sold, and the proceeds to be invested in the Bank of England; nor would he have directed the interest to be paid to her annually during her life, but he would have given her the whole at once. He appointed no trustee, because by the civil law no trustee is required. What we in England effect by a trustee is according to that law effected by a *fidei commissum*. The person who first takes the property is bound by it to observe the intention of the testator.

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Vanderlin-
den's Instit.
book 1, c. 9,
s. 8.

[Lord Wynford:—

Would not the Court of Chancery raise a trust of the same kind in a similar case?]

Where there is an express limitation for life with power to dispose by will, the interest is equivalent only to an estate for life, and the power is to be executed *primâ facie*, at least by will. Roper on Husband and Wife, p. 200. One of the cases cited

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by Mr. Roper in support of that position is *Nannock v. Horton*, which has been adduced by the Counsel on the opposite side for a very different purpose. In that case a life interest in a fund was given, with power to dispose of it by deed or will; the power was not properly executed, and it was held the property attempted to be disposed of did not pass. In the case of *Barford v. Street*, the power given to the plaintiff was to be executed by deed or will; it was executed by deed, and the question was whether it was such an execution of the power that the trustee in whom the property was vested ought to convey the legal interest to her. In the case of *Irwin v. Farrer* an estate for life was given with power to appoint by deed, or otherwise. The plaintiff filed her bill to have the money paid over to her, and the Court held that under the word "otherwise" she had an absolute power of disposition over the fund, and that the demand by the bill was a sufficient exercise of the power to enable it to order the payment of the money. The present case differs from all these, as the power of disposition is given by will alone. Mrs. Knight has in no way adiated the property in dispute. It was in Mrs. Cook's possession during her life, under the will of her husband. After her decease Mrs. Knight and her husband were the only persons (Mr. Cathery having also died, and no one having been appointed in his stead) who had any right to Mr. Cook's moiety of the estate. They took possession of it for the purpose of disposing of it in the manner directed by his will. The rule of the civil law is, that when possession is taken by any one, it is presumed that it is taken

under that title which is most beneficial to the possessor. The question of adiation is purely a question of intention, and we are bound to refer Mrs. Knight's acts of ownership to the title that is most favourable to her interests. There is no fact to show that she intended to take this property in opposition to her father's will. During a period of four years indeed four of the slaves were taken, and sold by the marshal for the debts of her husband, and she did not oppose it, but acts of nonfeasance and omission ought not to be construed to operate to the detriment of any person. As to the question of *legitim*, if she had taken it, the *legitim* would have been liable to her father's debts, but she elected to take under her father's will, and thereby rejected the *legitim*. Mrs. Knight's means of subsistence depend upon the decision of this case, and it is to be hoped it will not be adverse to her.

[*Rough* (Serjeant) and *Thompson* were with *Adam* for the respondents, but it being intimated that the Court was with them, they offered no arguments.]

Lushington, in reply :—

Mrs. Knight in this case has a general power of disposing of the estate, and slaves which belonged to her father after her mother's death, by the words of the will. She is also capable of disposing of the proceeds of it during her life. If you couple both these powers together, she has the absolute power of disposing at any time of the property, and therefore an absolute interest in it. This is the will of an Englishman and made in the English language, and therefore ought to be construed by the rules by which English wills are construed ; and according

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to these rules she takes an absolute interest. The intention of the testator can only be gathered from what he has put into writing ; and if it was not, there is not a syllable in the case to show that he knew that his son-in-law was in distressed circumstances at the time of his making the will. The compassion of their Lordships had been called upon for the situation of Mrs. Knight, but he trusted their justice would lead them to assist the creditors in recovering their just demands.

Lord WYNFORD :—

All that has been decided by the cases which have been cited to us from the reports of the English Court of Chancery is, that if an estate for life be given to a person in a property, with a power of disposing of that property either by will or deed, he may by a proper execution of his power at any time during his life acquire an absolute interest in that property. No Court of Equity has however yet said that before the donee had done any act to acquire that absolute interest, his creditors might take the property in execution, and proceed to an immediate sale of it. The question indeed here is whether the creditors can do what the party herself cannot do ; for the testator directs that “ at the death of his wife his estate, real and personal, shall be sold, “ that the money arising from the sale shall be immediately deposited in the Bank of England, and “ that the interest shall be paid to his daughter Elizabeth Knight annually during her natural life, and the principal to be wholly at her disposal at her death.” During her life Mrs. Knight has only the annual income arising from the pro-

perty; at her death, and not till then, is she to have the power to dispose of the principal. Neither the word "deed," nor any other word which has been considered by our Courts of Equity as giving an authority to dispose of the fund by an act *inter vivos*, is to be found here. The meaning of the testator is clear: Mrs. Knight was not to dispose of the bulk of the property, but by an instrument which was to take effect after her death. The disposition which a person engaged in the business, or in the enjoyment of the pleasures of life, would make to take effect at the moment, would be very different from one he would make, which was not to come into operation until after his decease: in the former case he would consider himself, in the latter his children. It is important to the interests of widows and children, that the doctrine allowing persons to whom the income of property is given for their lives, with a power of disposing of the principal of it at their deaths, to get the control over the whole at once, should not be extended. The circumstances I have mentioned distinguish this case from those that have been cited to us from the decisions of the Courts of our own country, but if they bore more strongly upon it, than they appear to me to do, we must decide it according to the laws of Holland.

The Dutch, as well as all the other nations of Europe (except the Spaniards), have rejected that part of the Roman law which secured to the wife all her property, and protected it against the debts of the husband. The Dutch, indeed, have carried the *communitas bonorum* farther than most other modern states; for (as we find it stated in a very excellent book, for a translation of which the public are very

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Henry's translation of Vanderlinden's Institutes, book 1, cap. 1, s. 8, p. 87.

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much indebted to a Gentleman at this bar) by the law of Holland all property, whether acquired by purchase, descent or gift, either before or after marriage, and all profits made from such property, are brought by marriage into community, and are liable to the debts of the husband and wife. The only property which is excepted from this law is such property as by the operation of the deed or will giving it, or by some contract previous to marriage, is to pass after the death of the first donee to some particular person, and such property as is affected with a trust or *fidei commissum*. The property in question was not given over to any particular person by name, but to such person as Mrs. Knight, by some instrument to take effect after her death, should dispose of it. I think that part of the testator's will would prevent the entire interest in the property from being brought into community; although I think the profits of it would be brought into community, and be liable to the husband's debts. The appellants have not attempted to get these profits into their hands, but they seized and were proceeding to a sale of the property itself. This they had no right to do. The property is affected with a trust or *fidei commissum*; it is to be sold, and the proceeds of the sale are to be deposited in the Bank of England. The execution of this trust, created by the will of the donor of the property (who had a right to encumber his gift with what conditions he pleased), would be defeated, if the sale were to be made by the creditors of the husband, and they, instead of investing the proceeds in the Bank, were to apply them in payment of the debts due to themselves. Whether, when the trust shall have been executed by a sale of the property, and by investing

the proceeds in the Bank, the husband's creditors may get hold of the dividends, is not now to be decided. They can only be entitled to the fruit; they have attempted to cut down the tree which is to bear it, and this attempt has been very properly defeated by the Court below.

Then another point has been ingeniously made at the bar, that the testator could not annex this trust to the whole of the property bequeathed by his will; because his daughter was entitled to the third part of that property as her legitimate share or *legitim*; but in the very chapter of Vanderlinden to which we were referred as supporting this objection, it will be found that a parent may put his child to her election whether she will take her legitimate share of his property unfettered, or the whole of it, subject to a *fidei commissum*. This will subjects the whole of the testator's property to a *fidei commissum*. The daughter could only take the whole property under this will subject to that *fidei commissum*. She has taken the whole property, and she must therefore be presumed to have adopted the will, and to have relinquished the *legitim*. Then it is said she could not do this to the prejudice of her husband's creditors. Suppose she had conveyed it away before this suit commenced, could her husband's creditors have got it back again? Certainly not. In England indeed by the statute of Elizabeth, and (as Lord Mansfield has said) at common law, property may be got at when it is conveyed away in fraud of judgment-creditors; but in this case there is no pretence for saying that the *legitim* has been conveyed away in fraud of a judgment, and if it had been conveyed away without fraud, the creditors right would have been destroyed. When Mrs. Knight gave up the right

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Vanderlin-
den's Insti-
tutes, b. 1,
cap. 9, s. 5
& 8.

13 Eliz. c. 5.

See Lord
Mansfield's
observations
in *Cadogan v.*
Kennett, Cow-
per, p. 434.

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she had to the *legitim*, although it was not an express, yet it was in effect a conveyance of the property, and it appears to have been so conveyed away before the proceedings were instituted under which the present appellants claim. Upon these grounds we are of opinion, that the judgment of the Court below ought to be affirmed.

Some discussion took place on the subject of costs, at the conclusion of which Lord Wynford delivered the opinion of their Lordships: "As the daughter has for some time permitted her husband to deal with this property as his own, by which circumstance the creditors might have been deceived, we think this appeal should be dismissed without costs."

Henry (amicus curiæ) mentioned a case from Sande's *Decisiones Frisicæ*, which had been determined upon the same grounds as the present*.

* Sande *Decisiones Frisicæ*, lib. 3, tit. 13, def. 3. "Titius multo ære alieno oppressus coram curiæ commissario creditoribus suis cessit omnibus bonis, insuperque promisit se eis satisfacturum, si quandocunque ad pinguiorem redierit fortunam. Post decessit mater Titii, eodem instituto hærede sed cum onere fidei commissi universalis, dehinc etiam obiit filius Titii, eodem Titio hærede instituto, sed tantum ex usufructu, et proprietate relictâ fratri suo. Titius utriusque testamento acquievit. Hinc creditores Titii contendunt ipsi Titio ex utraque hæreditate, et matris, et filii competisse legitimam liberam ab omni onere, quam ille in fraudem creditorum suorum non potuit repudiare. Itaque petunt se in locum Titii subrogari, sibi que utramque legitimam adjudicari, verum repulsam tulerunt. 20^{mo} Dec^{ris}, anno 1620. Sybe Peyma impetrant Exe Douves Ghedaeghde." See also Voet ad Pand. lib. 36, tit. 1, No. 37; Van Leuwen's Roman-Dutch Law, book 3, cap. 1, sec. 9, *et sequ.*

ON APPEAL FROM CALCUTTA.

RAMTONOO MULICK, RAMCONNAI } *Appellants.*
 MULICK, and others,

And

RAMGOPAUL MULICK & RAMRUT- } *Respondents.*
 TON MULICK *,

23d June
 1829.

THIS was an appeal from an order of the Supreme Court of Judicature at Fort William, in Bengal, of the 2d of May 1821, disallowing exceptions taken to a report of the Master of the 9th of June 1820, in a suit instituted by the appellants against the respondents, for an account of the property of which Nemychurn Mullick, the father of all the parties to this suit, died possessed. The report of the Master was made in pursuance of an order to him to inquire and report (among other things) what sum would be requisite for the performance and execution, in a suitable manner, of the several acts, works and ceremonies directed by the will and testamentary papers of Nemychurn Mullick to be performed and executed. Nemychurn's will and testamentary papers consisted of four written orders or directions, all of the same date, and addressed by him to the respondents, who were his eldest and fourth sons,

Construction
 of a Hindoo
 Will.

Where a testator directed a religious work to be performed at one place and a temple to be built at another, it did not follow that the work at the first place means the erection of a temple.

Referred to the Master to inquire whether there was any religious building amongst the Hindoos less expensive than a temple.

Where a testator directed a Ghaunt to be

built, referred back to the Master to inquire whether by the usages of the Hindoos it was necessary that it should also be consecrated.

Where a testator made two of his sons his executors, and directed that, when they should perform a religious or other act they should give notice to their brothers, and they should all perform the act, otherwise whatever the executors might think proper they should do, and should any one raise objections to it, they should be inadmissible: held that it did not give the executors an unlimited discretion in expending the testator's fortune in religious ceremonies.

* Ex Relatione.

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and whom he constituted his executors. The parts of them to which this order referred were the following: "You will from my estate perform my obsequies and those of my wife, and constantly perform religious acts in a suitable manner. Whenever you perform any religious, or other acts, you two brothers will inform the other six brothers; and if they acquiesce in your opinions, you eight brothers will perform the act collectively; otherwise, whatever you two brothers think proper, you will do; and should any one raise objections, it is inadmissible."—"It is my desire to perform some work at Sri Sri Brindabun and Sri Sri Juggernaut, and to make a ghaunt* on the bank of the Ganges, and to cause the Srimat Bangbot, the Sri Mohabharat, the Valmickee Puran, and the Choytonyo Mungul, to be chaunted: should good or harm happen to me before the completion of these, you will perform all these acts, and defray the expense thereof from the residue of my estate, which remains in your charge. It is my wish to make a temple for the Sri Sri Moha Probhu Jee, at Ombica: should I die before the completion of this, you will make the temple, and consecrate it, from the residue of my estate which remains under your charge."

The proceedings in this appeal were *ex parte*, no one appearing for the respondents.

Spankie (Serjeant), and *Jemmett*, who appeared for the appellants, were desired however by the Court to state and argue the case, which they accordingly did.

* A ghaunt is a flight of steps, or a landing-place on the bank of a river.

Lord WYNFORD:—

The interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government; and no person can be happy whose religious feelings are not respected. If this were a case between Europeans and Hindoos, we would not take a step without the assistance of some of the persons from India, who are acquainted with the usages of that country with regard to the ceremonies that ought to be observed, and the works that ought to be performed on the death of an opulent native; for we should fear, lest by the judgment which we might advise his Majesty to pronounce, the feelings of the people of Hindostan might be wounded; but this is a case where some members of a Hindoo family object to the allowance, that has been made to other members of the same family for the expenses of the obsequies of the father of all the litigant parties, and of the works which that father by his will directed to be done by those to whom he bequeathed his fortune. With respect to the obsequies, as the will gives no directions how they are to be performed, we have only to consider upon the evidence which these parties have laid before us whether the sums allowed for their performance are more, than have usually been expended at the funerals of persons of the same rank and fortune as the deceased. If they are more, as some members of the family object to them, we ought not to sanction the expenditure. The sums which have been allowed for the obsequies and works exceed a sixth of the property of the deceased, although he left

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behind him eight sons and two daughters. This will not surprise persons who are acquainted with the history of countries where the Roman Catholic religion has been established; in those countries a much larger proportion of mens substance was frequently directed to what we should now call superstitious uses. By the laws, for instance, now existing in Spain, a person, whatever his family may be, may give to the church one fifth of his fortune. I cannot, however, find upon the evidence, any case in which in India more, than three per cent has been expended in obsequies and works, and the persons on account of whom in those cases such allowances have been made were men of superior caste, and larger fortune than the deceased. The sums too which have been here allowed exceed what had been expended by the deceased and his brother for the funeral of their mother. Indeed, although much evidence has been given as to what was usually expended on these occasions, and although that was the proper inquiry for the Master to make, he has satisfied himself with endeavouring to ascertain what had been actually expended, and not what ought to have been expended. Such a mode of settling a claim of this sort would leave families entirely at the mercy of those who execute the will of their parents, as they might expend whatever sum they liked, however ruinous such expenditure might be to those who had the property bequeathed to them. It is true, that in the will all the children are to be required by the executors to attend the ceremonies; and if they decline attending them, the executors are to perform those ceremonies by themselves, and no one is to be permitted

to object to the manner in which they shall have been performed; but we do not think this clause gives to the executors a power of incurring any expense they might think proper without control, and without account. The meaning of these words is this; if you do not think proper to attend the obsequies of your father you shall not be heard afterwards to find fault with the manner in which the ceremonies were performed, or to raise trifling objections to the expense incurred; but these words do not give the executors an unlimited authority to waste the property of the deceased, and to leave his children destitute.

With respect to the works to be done, the Master has reported that a temple should be built and consecrated at Sri Sri Brindabun, and a ghaunt built and consecrated on the Ganges. Now, when the deceased intended that a temple should be built, he has said so in express words; so when he intended that a building should be consecrated, he has expressed that intention in his will, but he has not directed that a temple was to be built at Sri Sri Brindabun, or that the ghaunt was to be consecrated; and the Master has not reported to us any evidence from which he could have ascertained these to have been his intention.

We have therefore nothing to guide our judgment but the will of the deceased, and judging from that we cannot say we think the Master has decided rightly. If no direction had been given in the will to build a temple at any place, we might have thought with the Master, who ought to be better acquainted with the usages of the Hindoos than we can be, that a temple was the only building a dying

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Hindoo could have contemplated when he directed a work to be performed at Brindabun, as we must suppose he meant a building to be used for religious purposes, but as there are other buildings used for religious purposes, until this matter is more fully explained to us we are bound to suppose, since he has not directed a temple to be built at Brindabun, although he has directed one to be built at another place, that he meant some other building to be erected at Brindabun; otherwise his directions with respect to the one place would have been in the same terms as they are with respect to the other. If there is any usage among the Hindoos, that a ghaunt or landing-place should always be consecrated, we should have had evidence of that usage. In the absence of such evidence the testator having directed other buildings to be consecrated, and not having given any directions for the consecration of this ghaunt, we think that the Master was not authorized by the will to allow the expenses attending the consecration of it.

For these reasons we shall advise His Majesty to reverse the decree of the Court of Calcutta, and direct that Court to refer this case again to the Master, ordering him to inquire what, according to the usages of the Hindoos, should be expended in the obsequies of a person of the caste, and fortune of Nemychurn Mullick; and whether there are any cheaper religious buildings than temples; and whether all ghaunts must be consecrated; and that the Master be directed to reduce the allowance on these accounts to what is usual and proper in such a case as the present.

BY PETITION FROM THE MAURITIUS.

The Heirs CAMBERNON - *Petitioners,*
 And
 EGROIGNARD & SOUBRIÉ - *Respondents.*

20th Feb.
 1830.

THE petitioners, the heirs Camberton, were intervening parties in a suit instituted for the purpose of settling the rights of the family of Egroignard. The petitioners entered their appeal against two decrees of the Court of Appeals in the Island, and tendered security for the prosecution of it; their security was objected to by the other party, and the court below adjudged it to be insufficient. They then petitioned the Privy Council, praying that the decrees might be reversed. The Respondents prescribed a counter-petition, praying that the petition of the Appellants might be rejected, and the decrees carried into execution. By the fourth article of a proclamation of the governor of the Mauritius, in pursuance of instructions from the secretary for the colonial department, it was decreed "that all questions relative to the securities to be given in appeals relative to their amount, value, sufficiency, or reception, should be decided by the Court, against whose judgment or decree an appeal to his Majesty in his Privy Council should be made." Their Lordships, after hearing the counsel on both sides, were of opinion, that as the court below had decided that the security tendered by the Appellants was insufficient, they had no jurisdiction on the subject,

The Court below at the Mauritius is the sole judge of the sufficiency of the security to be given for the due prosecution of an appeal.

Where that Court has refused to allow an appeal on account of the insufficiency of the security tendered, the Privy Council will not allow one to be instituted.

1830. and the Appellants petition was dismissed with costs.
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Lushington (Dr.), for the Respondents.

10th July 1830. A petition for leave to appeal in this case, on giving such security as the Council should think fit, was afterwards presented by the Appellant, which their Lordships, upon hearing Knight, (K.C.) for the petitioner, and Lushington, (Dr.) for the Respondents, dismissed with costs.

ON APPEAL FROM DEMERARA.

C. CRAIG - - - *Petitioner,*

And

R. SHAND - - - *Respondent.*20th Feb.
1830.

THE old instructions to the governor of Demerara, with respect to the security to be required from appellants on granting leave to appeal from the decisions of the superior courts of that settlement, were, "that good security should be given by the appellant that he would effectually prosecute the same, and answer the condemnation, and also pay such costs and charges as should be awarded by his Majesty in Council, in case the sentence of such superior court should be confirmed."

It was stated at the Bar to have been the practice for the governor under those instructions (which are similarly worded to the instructions to the governors of the most of the other West India colonies, with regard to the allowance of appeals) never to require more than 500*l.* security from the appellants to answer the costs.

By an order of Council of the 15th of December 1828, various alterations were made in the method of prosecuting appeals from Demerara, and amongst others, the application for liberty to appeal was directed to be made to the court of justice in that colony instead of the governor; and the court was empowered "either to permit the sentence to be carried into execution, the person in whose favour it should be given entering into good and sufficient

An order of Council having been made altering the mode of appealing from the colony, and having been directed by a proclamation of the governor, dated the 14th of May, to take effect from the 18th, held that an appeal which had been noted on the 2d of that month from a judgment made on the 1st, and on which the petition to appeal had been presented on the 15th, ought to be prosecuted according to the previous practice, and not according to the order.

Seemle. The Privy Council will not direct a greater security to be entered into by an appellant on granting him leave to appeal, than it had been the

practice to require in the colony, although the instructions to the Governor empowered him to require greater.

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“ security for the due performance of such order as
“ his Majesty should make thereon, or to direct the
“ execution of the sentence to be suspended pending
“ the appeal, the appellant entering into similar
“ securities to the satisfaction of the Court for the
“ prosecution of the appeal, and for payment of all
“ such costs as might be awarded by his Majesty.”
This order was directed to take effect from the
1st of July 1829, or on such earlier day as the
governor, or lieutenant-governor for the time being,
should by his proclamation appoint. The lieu-
tenant-governor appointed it by his proclamation,
issued on the 14th of May 1829. to take effect from
the 18th of that month.

Judgment was given against the petitioner on the
1st of May 1829, in the sum of 5,000*l.*, with in-
terest and costs. On the 2nd, his attorney noted his
appeal from this judgment, and on the 15th lodged
his petition for leave to appeal, addressed to the
Governor, in the office of the government secretary.
The Governor referred the petitioner to the Court
of Justice “ for the purpose aforesaid prayed in the
“ terms of his Majesty’s Order in Council of the
15th of December 1828.” He then entered a pro-
test against the proceedings of the Governor, and
petitioned the Court of Justice. That Court on the
6th of June suspended the sentence for fourteen
days, to enable him to enter into good and sufficient
security, to be approved of by the Court, for the due
performance of such order as his Majesty should
think fit to make thereon. He then petitioned the
Court, stating, that he conceived he was entitled to
appeal on giving such security as would have been
required in the colony previously to the issuing of

the last order, and praying, therefore, that they would accept security for the costs of the appeal, and grant an inhibition against the execution of the judgment. The Court, however, refused to grant this petition; and by an order of the 2nd of July allowed the judgment to be carried into execution on the respondents entering into security in the sum of 7,800*l.* for the due performance of such order as his Majesty should think fit to make thereon.

The prayer of the petition now presented to the King in Council was, that the petitioner might be at liberty to prosecute his appeal against the judgment of the first of May; that the order of the 2nd of July, and all executions and levies thereon, might be discharged; and that the respondent might be inhibited from proceeding on the sentence of the 1st of May. Two questions were made in the argument. One was, whether the Court of Justice had any jurisdiction to make an order respecting the costs of an appeal prior either to the proclamation of the new order, or the time it was ordered to take effect from; the other was, as to the amount of security the petitioner ought to enter into.

Adam (K. C.) and *Burge*, for the Petitioner.

Lushington (Dr.) and *Henry*, for the Respondents.

MASTER OF THE ROLLS:—

Their Lordships are of opinion, that judgment having been obtained on the 1st of May, and the new order not having been promulgated in the colony until the 14th, the petition for leave to appeal was not governed by that order, but by the

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practice that existed previously. Now according to that practice a security for 500*l.* was all which would have been required. The order of the Court below was wrong; for they ought not to have exercised a jurisdiction in this case of entertaining the petition by requiring security under the new order. Their Lordships also are of opinion, that as a sale of the petitioners property by execution would cause great mischief, it would be fit to stay proceedings under the sentence on the usual security of 500*l.* being given.

It was agreed at the Bar that the security for 500*l.* should be given in the usual form, to answer both the costs and the condemnation.

ON APPEAL FROM JERSEY.

JOHN LE QUESNE, the younger, *Appellant*.

And

JOHN NICOLLE - - - *Respondent*.1830.
20th February
10th July.

THIS case arose on an action brought by the Respondent on the 4th of December 1822, against the Appellant, to recover the amount of a judgment and costs, which had been obtained against him (as he contended) through the negligence of the Appellant (who was Prevôt of the parish of St. John) in not having served a notice of trial. The Royal Court at Jersey condemned the Appellant to pay the whole of the Respondent's claim, with costs. On the first argument before the Privy Council on the appeal from this last judgment, their Lordships ordered it "to be referred to the full number of jurors of the Royal Court, to certify to them, whether, according to the practice of the said Royal Court, with reasonable diligence, the Respondent Nicolle, notwithstanding the default of the Appellant, might have reserved his right of defence as against the original plaintiff Gruchy." The full number of jurors of that Court by their certificate, signed by their Greffier, certified, that the Respondent might notwithstanding the default have reserved his right of defence.

When the Privy Council has sent a reference to a court below for them to certify, as to a point of their practice, their certificate cannot be disputed, unless a petition praying for a fresh reference is presented, and supported by affidavits disputing the accuracy of the certificate.

On the second hearing,

Brougham William, for the Respondent,
Contended that the practice had changed since 1822; and that the certificate spoke of the practice,

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as it now existed, but that according to the ancient practice, which prevailed at the time of the Appellant's negligence in serving the notice, the Respondent had lost his right of defence.

Pennington, é contra.

MASTER OF THE ROLLS:—

Any facts, such as have been stated by Mr. Brougham, might have been alleged in a petition supported by affidavits complaining of this certificate, and asking for a fresh reference. No such petition has however been presented, and if the Court were to grant leave to present one now it would render litigation eternal. We have sent to the Court below for a certificate upon a point of practice. That Court has returned their certificate; and now it is contended that the judges there do not know the practice of their own court. It is impossible to suppose so much ignorance, and judgment must be given accordingly in favour of the Appellant.

ON APPEAL FROM THE SUPREME COURT
AT CALCUTTA.

LEWIS OWEN EDWARDS, - *Appellant*,
And

HOWARD RONALD, GEORGE }
DICKSON, and THOMAS LEAR- } *Respondents.* 25 May 1825,
MOUTH, } 3 April 1827,
5 March 1830.

THE Respondents brought an action of *assumpsit* in the Supreme Court, for goods sold and delivered, and work and labour done, and on the common money counts on the 4th of December 1821. The Appellant pleaded, 1st, the general issue; 2ndly, a general plea of bankruptcy by a creditor at Calcutta, and that the causes of action accrued before he became bankrupt; and, 3rdly, a special plea of bankruptcy: "That the said defendant heretofore, and before
" and until the suing out of the commission of
" bankruptcy hereinafter mentioned, was a merchant
" and trader, and did use and exercise the trade of
" a merchant, by way of bargaining, exchanging,
" bartering and chevisance, and sought his trade
" and living by buying and selling, to wit, at Lon-
" don, to wit, at Calcutta aforesaid. And the said
" defendant so using, &c., afterwards, to wit, on the
" 18th day of May 1820, to wit, at London, &c.
" became and was indebted as such merchant and
" dealer to divers and lawful creditors of him the
" said defendant, in divers large sums of money to
" a large amount, to wit, &c.: and the said de-
" fendant being so indebted as aforesaid, and being

A certificate of conformity obtained under a commission of Bankrupt in England, is a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta.

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“ a subject of Great Britain, and so using, &c.
 “ afterwards, to wit, on the same day and year last
 “ mentioned, at London, to wit, at, &c., the said
 “ several debts to the said several creditors being
 “ then and there due, and wholly unpaid and un-
 “ satisfied, he the said defendant then and there
 “ became and was a bankrupt within the true intent
 “ and meaning of the several statutes then and still
 “ in force in that part of the United Kingdom of
 “ Great Britain and Ireland called England, con-
 “ cerning bankruptcy made and provided, some or
 “ one of them; and thereupon afterwards, to wit,
 “ on the 19th of May in the year aforesaid, at
 “ Westminster, to wit, &c., a certain commission of
 “ bankruptcy, under the Great Seal of the United
 “ Kingdom of Great Britain and Ireland, bearing
 “ date at Westminster the same day and year last
 “ aforesaid, grounded upon the said several statutes,
 “ some or one of them, was on the petition of
 “ Edward Edwards, a just and lawful creditor of the
 “ said defendant, to the amount required by law,
 “ and concerning to the provisions of the said
 “ several statutes, or some of them, duly awarded
 “ and issued against him the said Lewis Owen
 “ Edwards, directed to certain commissioners, &c.,
 “ thereby giving full power and authority to the
 “ said commissioners, four or three of them, to ex-
 “ ecute the said commission, as in and by the said
 “ commission, relation being thereunto had, &c.
 “ By virtue of which said commission, and by force
 “ of the said several statutes concerning bankrupts,
 “ the major part of the said commissioners named
 “ in the said commission, afterwards, to wit, on the
 “ 19th of May 1820 aforesaid, at London, to wit,

“ &c., did in due form of law find, adjudge, and
“ declare the said defendant to be, and that the said
“ defendant had become and was bankrupt within
“ the true intent and meaning of the several statutes
“ made and then in force concerning bankrupts.
“ And further, that afterwards, to wit, on Saturday
“ the 19th of May 1820 aforesaid, at Westminster,
“ to wit, &c., due notice was given and published in
“ the London Gazette, that such commission of bank-
“ ruptcy had been and was awarded and issued forth
“ against him the said defendant ; and that he the
“ said defendant had been declared bankrupt thereon,
“ and refused to surrender himself. And further, that
“ three several meetings were duly appointed for his
“ surrendering himself, and making a full disclosure
“ and discovery of his estate and effects, and finish-
“ ing his examination under the said commission,
“ according to the form of the statute, &c., and that
“ he duly surrendered himself to the major part of the
“ said commissioners in and by the said commission
“ named and authorized ; and submitted himself to
“ be from time to time examined touching the dis-
“ closure and discovery of his estate and effects ;
“ and at the last of these three meetings at London,
“ to wit, &c., the said defendant finished his exam-
“ ination upon oath before the said commissioners,
“ and upon such his examination, then and there
“ made a full disclosure and discovery of his estate
“ and effects. And further, that he hath always,
“ from the time of issuing forth the said commission
“ hitherto, to wit, at London, to wit, &c., in all
“ things conformed himself to the provisions of the
“ said several Acts of Parliament made and then in
“ force as aforesaid concerning bankrupts, particu-
“ larly of a certain Act of Parliament made in the

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“ fifth year of the reign of his late Majesty King
 “ George the Second, intituled ‘ An Act to prevent
 “ ‘ the committing of Frauds by Bankrupts.’ And
 “ further, that he the said defendant, afterwards, to
 “ wit, on the 17th of June 1820, to wit, at London,
 “ &c., duly obtained his certificate of conformity
 “ under the said commission to the said statutes
 “ made, and then in force as aforesaid concerning
 “ bankrupts; and which said certificate was after-
 “ wards, and before the commencement of this suit,
 “ to wit, on the 13th of July 1820 aforesaid, to wit,
 “ at Westminster, to wit, at Calcutta aforesaid,
 “ duly allowed and confirmed by the Right Ho-
 “ nourable John Lord Eldon, Baron Eldon of Eldon
 “ in the county of Durham, then and there being
 “ Lord High Chancellor of Great Britain, accord-
 “ ing to the form of the statute in that case made
 “ and provided. And further, that the said several
 “ causes of action in the said plaint mentioned ac-
 “ crued, and each and every of them did accrue, to
 “ the said plaintiffs before the said defendant so
 “ became a bankrupt as aforesaid, to wit, at Lon-
 “ don, &c.”

The Respondents joined issue upon the first plea,
 and to the second replied, “ That the said defendant,
 “ after he became bankrupt, and before the filing of
 “ said plaint, ratified and confirmed the said several
 “ promises and undertakings in the said plaint men-
 “ tioned;” upon which replication the Appellant
 afterwards took issue, and to the last plea the Re-
 spondents replied as follows; viz.

“ That the said several promises and undertakings
 “ in the said plaint mentioned, and each and every
 “ of them, were and was made; and that the said
 “ several causes of action in the said plaint men-

"tioned, and each and every of them, arose and
 "accrued to the said plaintiffs at Calcutta, at Fort
 "William, in Bengal in the East Indies, and not
 "elsewhere ; and that neither at or from the time of
 "his the said defendant's becoming a bankrupt, as
 "in the third plea mentioned, until or at the time of
 "his obtaining his certificate under the commission
 "in the said third plea mentioned, and of the same
 "being confirmed and allowed by the Lord High
 "Chancellor of Great Britain, as in the said third
 "plea also mentioned, they the said plaintiffs had
 "any notice of the said bankruptcy of the said
 "defendant, or of the issuing forth of the said com-
 "mission, or of the proceedings, or any of them
 "had under the same as in the third plea men-
 "tioned ; and that they the said plaintiffs during
 "all the times aforesaid were resident in the pro-
 "vince of Bengal in the East Indies aforesaid, &c."

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To this replication the defendant demurred generally, and the plaintiffs joined in demurrer.

The issues in fact came on to be tried on the 1st of February 1822, Sir Francis Macnaghten being the only judge present ; when a verdict was found for the respondents on the general issue, damages 6,992, Sicca rupees, 7 annas, 3 pice, and costs ; and a verdict was found for the appellant on the second issue. On the 2nd of February 1822, the demurrer was called on for argument, but the counsel for the appellant declining to argue it, in consequence of a former decision of the Supreme Court upon the same point, it was therefore over-ruled, and judgment given for the respondents.

From this decision the present appeal was instituted.

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* 1st Rose,
 162; and see
Selkirk v. Da-
vis, 2d Rose,
 292.

It came on to be heard on the 25th of May 1825, but was then ordered to stand over until an appeal from the Court of Session in Scotland, in the case of * *the Bank of Scotland v. Cuthbert*, which was then supposed to have been instituted to the House of Lords, and was *in pari materid* should have been determined. After some time, however, it was ascertained that no appeal had ever been instituted against the decision in that case, and the cause therefore was argued before their Lordships on the 3d of April 1827. The reporter has been unable to procure any note of this argument. The reasons annexed to the printed case for the appellant, which were signed by Horne (K.C.), and Rose (K.C.), were "Because the certificate in the pleadings mentioned and relied upon was duly obtained by the appellant, by virtue of the several statutes concerning bankrupts in England, and is by the law of England a legal bar to all debts contracted prior to the appellant becoming bankrupt, and among others to the debts contracted in Calcutta aforesaid, a place governed by and subject to the laws of England; and the said certificate admitted by the pleadings ought to have been allowed as such legal bar to the said action, in the said Supreme Court, which being a Court constituted by charter from the Crown, pursuant to an Act of Parliament in that behalf, and administering justice according to the laws of England, ought to have given effect to the certificate granted by virtue of the said several statutes.

That the said issue of fact joined on the replication to the said first plea of bankruptcy, being found for the appellant, the said plea is a bar to

the said action, and the appellant was entitled to judgment on the whole record.

That the appellant was entitled to judgment on the said demurrer, as the matters stated, and alleged in the said replication to the said second plea of bankruptcy are not sufficient in law to avoid the legal effect of the matters pleaded in the said second plea, and by the said replication admitted to be true."

The reasons annexed to the printed case for the respondents, which were signed by the Solicitor-General Tindal, were "Because the law of England by which a bankrupt is discharged by his certificate from debts contracted before his bankruptcy, depends upon a statute which has no provisions applying to the case of a debt contracted and sued for in the East Indies :

Because the Justices of the Supreme Court of Judicature at Fort William, in Bengal, have no jurisdiction by the charter granted under the 13th Geo. 3. c. 63, to give the effect to the bankrupt's certificate which is contended for by the plea.'"

The case being one of great importance, their Lordships took time to deliberate upon it, and the final judgment of the Court was delivered by the Lord Chancellor in writing on the 4th of March 1830, in these terms, "I have read and considered " the papers in the above case, and am of opinion " that the judgment of the Court in India ought to " be reversed. I think the certificate was in this " case a sufficient bar."

The principle, that a bankruptcy is a complete bar to all actions for debts contracted previously to it, has been also re-

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A bankrupt,
who has as-
signed his pro-

perty to his assignees under a French commission of bankrupt, cannot afterwards be sued in a Court of Justice in the British dominions by one of his creditors for a debt proved under it.

Seemle, nor even for a debt not proved under it.

The fact of the bankrupt having absconded, and having been condemned whilst absent, to five years imprisonment, and hard labour, for a fraudulent bankruptcy, does not give any further right to a creditor to sue him for a debt contracted before his bankruptcy.

cognized by the Privy Council in the case of *Quelin v. Moisson*, which was heard on appeal from Jersey, on the 14th of July 1827.

Quelin, the appellant, had been declared a bankrupt by a judgment of the Tribunal of Commerce at Nantes, on the 20th of January, 1823. He obtained a protection from arrest, (*sauf conduit*), but afterwards absconded to Jersey. In his absence he was prosecuted for a fraudulent bankruptcy, and was condemned *par contumace* to five years imprisonment and hard labour (*travaux forcés*). Previously to his bankruptcy he had given a note of hand for 7,000 francs (*billet à ordre*) to a widow of the name of Nau, in Nantes. She proved the amount of this note as a debt under the bankruptcy, but did not attend the meeting for the appointment of an assignee (*syndic définitif*), and banker, and afterwards indorsed the note over to a third person, who indorsed it to the respondent, the plaintiff in the Court below, an inhabitant of Jersey. He sued the appellant for the amount of the note in the Royal Court there. The appellant pleaded his bankruptcy in France in bar of the action, and on his plea being overruled he appealed to the Privy Council. Their Lordships ordered the following questions to be referred to two French Advocates, to be named by the British Ambassador at Paris, 1st, Whether a person whose property had passed to Syndics under the law "*de la faillite*" could afterwards be sued by any creditor, who had proved his debt before the Syndics? 2dly, If, generally, such person could not afterwards be sued by such a creditor, did he lose that protection by a sentence *par contumace*, and by competent judges, for not having been able to give a proper account of his receipts and disbursements, for having misapplied several sums of money and other property to the prejudice of his creditors, for having concealed his books, or not have kept them, and for having violated the *sauf conduit* granted him by the Tribunal of Commerce? The Ambassador made choice of Messrs. Delagrangé and Dupin aîné, and they having given their opinion upon the first point, "that the bankrupt could not be sued even by a creditor who had not proved his debts before the Syndics, and *à fortiori* could not be sued by one who had proved;" and upon the second, "that the sentence *par contumace* would not have any effect so as to give a new right to sue to a creditor," their Lordships, on the 23rd of February 1828, reversed the judgment of the Court below.

BY PETITION FROM ANTIGUA.

In Re The JUSTICES of the COURT OF COMMON
PLEAS at Antigua.

1829.
21st Dec.
1830.
6th April.

THE petitioner in this case had been dis-barred by the Justices of the Court of Common Pleas at Antigua for various acts of professional and general misconduct, with which he had been charged by the Attorney-general and several other practising Advocates there. The Advocates at Antigua practise both as Barristers and Attornies. They are admitted to practise in both characters by the Court of Common Pleas there, and afterwards practise in all the other Courts in the Island*. Previously to the final order for the dis-barring the petitioner the Court had, at the desire of the Colonial Secretary, examined witnesses upon the charges which had been made against him. He petitioned the Privy Council to restore him to the Bar. The Judges presented a memorial in answer to the allegations contained in his petition, in which they cited the *King v. Gray's Inn*†, and *Mitchell's case*‡, as authorities to prove the right of Courts to expel from the Bar those of its members who misconduct themselves. The case was argued at great length upon the merits.

The power of Colonial Courts to prevent advocates who misconduct themselves from practising before them cannot be disputed.

Burge and *Athill* for the Justices also cited the *King v. Southerton*§, in answer to a complaint made by the petitioner that the Justices had proceeded to

* See the 3rd Report of the Commissioners on the Administration of Justice in the West Indies, page 26.

† Cowper, 339. ‡ 2d Atkyns, 173. § 6th East, 143.

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dis-bar him instead of striking him off the Roll as an attorney, in which case he contended there must have been a regular prosecutor, and the *King v. Crosby* *, in answer to an objection made by him in the Court below, that as there had been no prosecutor, none of the witnesses who had been examined by the Justices could be indicted for perjury, and therefore that the proceedings against him were not valid.

LORD WYNFORD:—

In England the Courts of Justice are relieved from the unpleasant duty of dis-barring advocates in consequence of the power of calling to the Bar and dis-barring having been in very remote times delegated to the Inns of Court. In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine, who are fit persons to practise as advocates and attornies there. Now advocates and attornies have always been admitted in the Colonial Courts by the Judges, and the Judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to attornies. In Antigua the characters of advocates and attornies are given to one person; the Court therefore that confers both characters may for just cause take both away. Although indeed our own Courts donot dis-bar for the reason I have mentioned, I have no doubt they might prevent a barrister, who had acted dishonestly from practising before them. In

* 7th Term Reports, 515.

a case * which came before us a short time ago from Bombay, none of the members of this Board doubted that the Supreme Court there had authority to prevent English barristers to practise before them. The question was whether their authority had been properly exercised. Whilst advocates in the Colonies have an appeal to his Majesty the power to remove them from practice can never be abused.

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Lushington (Dr.), for the Petitioner,
 Disclaimed all intention of disputing the jurisdiction of the Court at Antigua.

The Report of the Council to his Majesty was that they saw no reason to advise him to interfere with the order of the Court below.

ON APPEAL FROM GIBRALTAR.

JOSE SANTACANA Y ALOY - *Appellant.*

And

JAYME ARDEVOL - *Respondent.*

8th May
 1830.

THIS was an appeal from a decision of the Court of Civil Pleas at Gibraltar, in an action brought by the respondent against the appellant, for money had and received for his the respondent's use. The appellant pleaded a set-off, and on trial he admitted the respondent's claim, and then endea-

No appeal will lie from the judgment of a Court below on the sole ground that it discredited the testimony of the witnesses improperly.

* In that case the Recorder's Court had suspended the whole bar for six months from practice. On the hearing the Privy Council deferred its determination until further evidence should have been brought from Bombay, but the case has never been brought forward again.

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voured to establish his own set-off by evidence. The Court however decided against him, and he then instituted his appeal. His reason for doing so, as stated in his printed case, was, that this decree was contrary to the evidence given at the trial.

Pollock (K. C.), and *Tomlinson*, for the Appellant.

Adam (K. C.), and *Busby*, for the Respondents.

MASTER of the ROLLS:—

Their Lordships are of opinion that they ought to decide this question upon general principle, and not upon a mere point of form *. The Court below proceeded on the ground that they discredited the witnesses on the part of the appellant. This Board never heard of an appeal having been instituted on the ground that witnesses had been discredited; the Court below were aware of the character of those witnesses; and besides the knowledge of their character had the advantage of seeing their demeanour and behaviour, of which we on written evidence have no power of judging. We feel it our duty therefore to decide this case on the general principle, that no appeal will lie from the judgment of a Court below on the ground that the Court discredited the witnesses produced to them by either party.

Appeal dismissed, with costs.

* An objection had been made that the appeal should not have been made from the judgment of the Court below on the trial of the case, but that an application ought properly to have been made to that Court for a new trial, and if they had refused to grant one, an appeal ought to have been instituted from their judgment on that occasion.

ON APPEAL FROM THE ISLE OF MAN.

FREDERICK LA MOTHE, - - *Appellant.*

And

REBECCA ELIZABETH LA MOTHE, *Respondent.*8th May,
1830.

DOMINIQUE La Mothe, in the life-time of his wife, Susanna La Mothe, and in the years 1768 and 1775, purchased some lands of the tenure called Quarterlands, in the Isle of Man. Susanna died in 1803, having previously by her will bequeathed to Dominique all her share of their houses and lands, to hold unto him, his heirs and assigns, for ever. He died shortly after, having by his will given to the appellant, his heirs and assigns, the property he had purchased in 1768 and 1775. The appellant thereupon took and continued in possession of this property until 1825, when the respondent, who was the heiress at law of Dominique, brought an action against him for a moiety of it. This action was upon the first trial dismissed, with costs. Upon appeal however to the house of Keys the respondent was declared entitled to a moiety of the property. From that decree this appeal was instituted. The question was, whether the moiety claimed by the respondent passed under the will of Mrs. La Mothe to her husband, or whether he remained in possession of it under his purchase*. By the law of the island, quarterland, which has passed one descent,

A wife takes such an interest in the lands of the tenure of Quarterlands in the Isle of Man, purchased by her husband, that she may, by a will in his life-time, devise a moiety of them either to him or her children. If she makes such a devise to her husband, he takes them as a devisee under her will, and cannot devise them away from his heir-at-law, as he could have otherwise done.

* Johnson's Manks Jurisprudence, p. 36.

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or to which the title is by devise, cannot be disposed of by will *. Any proprietor may dispose of it by deed, but the first purchaser alone has the power of doing so by will †.

The appellants contended, that although Mrs. La Mothe, if she had survived her husband would have been entitled to a moiety of his purchased lands ‡; yet as he survived her, he remained entitled to them as a purchaser, notwithstanding her devise to him, and was consequently entitled to devise them himself to whomsoever he pleased. The respondent contended that Mrs. La Mothe took such an interest in a moiety of the lands upon the purchase as to be able to devise it to her husband or children; that she did devise it to her husband; and he took it under her will, and consequently had not the power of disposing of it by his will, and that therefore it passed to his heir at law. Both parties relied upon the Act † of Tynwald of 22d of July 1777, intituled "An Act for the ascertaining the interest of a Wife or Widow in the estate of her husband," in addition to which, the respondent cited two decisions from the records of the Common Law Court of the island, in *Corrin v. Quayle*, 21st of May 1762, and *Corlett v. Kelly and Wife*, 7th of May 1816, and she also produced two deeds entered upon the records of the island, and showing the method by which undevisable quarterlands, by a fictitious sale and re-purchase, are rendered devisable.

* Johnson's Manks Jurisprudence, pp. 41 & 129.

† Purchaser in the Manks Laws appears always to mean purchaser for a valuable consideration.

‡ Douglass, Laws of the Isle of Man, Edit. 1819, p. 424.

Campbell, for the Appellant.

Platt, for the Respondents.

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Delivered the opinion of their Lordships, that the Act of Tynwald, and the two cases cited by the respondent, were conclusive against the appellant. In that act there was a proviso that "nothing" therein should prevent a wife from making a will "of the lands, premises and effects aforesaid, even in" the life-time of her husband, as theretofore accustomed in favour of the lawful issue of her body, "or to her husband." It is true that purchasers may devise, and that the husband was originally a purchaser, but the effect of the purchase was to pass a moiety of the property purchased to the wife, and she devised to the husband, who therefore became possessed of that moiety as a devisee.

Campbell observed, that if she had not devised the lands the husband would have had the power of devising it himself.

Master of the Rolls, so he would ; but there is a special proviso in the Act which allows her to devise it to him.

Appeal dismissed.

ON APPEAL, AND CROSS APPEAL, FROM
DEMERARA.

THOMAS FRANKLAND, *Appellant* in the 1st,
and *Respondent* in the 2nd Appeal,

And,

JOHN MURRAY M'GUSTY, and JOHN PEARCE,
Attornies for WM. FRASER, JAMES FRASER,
and JOHN M'CAUL, *Respondents* in the 1st,
and *Appellants* in the 2nd Appeal.

1830.
27th Feb.
13 March,
8th May,
10th July.

Decree of
Court below
for a sum of
money due on
foreign judg-
ments, re-
versed on the
ground that
those judg-
ments had
been impro-
perly obtained.

Certificate of
deputy secre-
tary in St.
Vincent, that
he had search-
ed the secre-
tary's office,
and could find
no warrant of
attorney to
confess judg-
ment in an
action, re-
ceived as evi-
dence of the
non-existence
of such a power,
having been
admitted as
such in the
Court below.

IN this case, both parties had appealed against a Decree of the Court of Justice at Demerara. The one, Frankland, against whom it was given, generally on the merits, and the others, M'Gusty and Pearce, because the Court had not given interest on the sum they had recovered. The action was commenced on the 20th of October 1824, and it was brought upon three judgments which had been obtained in the Court of King's Bench and Common Pleas in the Island of St. Vincents, against Charles Grant, Peter Grant, James Grant, and Thomas Fraser, who were merchants trading together as partners under the firm of Charles Grant & Co., in that island, by the respondents William Fraser, James Fraser, and John M'Caul, who together with Peter Grant, and some other persons then deceased, were the

Bills drawn by one partner for a separate debt in the partnership name cannot be recovered upon as against the firm, unless the plaintiff can prove either a direct assent from the other partners, or circumstances from which such assent might have been reasonably presumed.

Semble.—Objections cannot be made to a Decree at the hearing before the Privy Council, that have not been made in the Court below.

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executors of William Fraser. All these judgments had been obtained upon the confession of a Mr. D., who had acted as counsel and attorney for the defendants, Messrs. C. Grant & Co.

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The first of them was for a sum of 1,445*l.* 7*s.* 7*d.* currency, and 15*l.* 5*s.* 2*d.* costs. The declaration on the action in which it was recovered was in *assumpsit* for goods sold and delivered; it was filed on the 26th of July 1803, and service of it accepted by Mr. D. as of the 13th of the June preceding. The judgment was obtained on the 19th of July, and execution was issued on it on the 12th of August 1803.

The second judgment was for the sum of 5,825*l.* 8*s.* 8*d.* damages, and 15*l.* 5*s.* 2*d.* costs. The Declaration in the action in which it was obtained was in *assumpsit* for two bills of exchange, both for 2,500*l.* sterling; the first was dated the 1st of September 1801, and drawn by C. Grant, P. Grant, J. Grant, and T. Fraser, in favour of William Fraser or order, and payable twelve months after date, on Charles Grant, and accepted by him; and the second was of the same date, and drawn by the same parties in favour of William Fraser, or order, payable fifteen months after date, on Charles Grant, and accepted by him. Both of these bills were stated to have been presented for payment in London. The declaration was filed on the 28th of July 1803, and service of this declaration was accepted by Mr. D. as of the 7th of the preceding March. The judgment was obtained on the 19th of July, and execution was issued on it on the 12th of August 1803.

The third judgment was for the sum of 2,787*l.*

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14*s.* 4*d.* sterling, damages, and 15*l.* 5*s.* 2*d.* currency, costs. The declaration in the action in which it was obtained was in *assumpsit* on a bill of exchange, dated the 1st of September 1801, for 2,500*l.* sterling, payable twenty-one months after date, drawn by C. Grant, P. Grant, J. Grant, and T. Fraser, on C. Grant, and accepted by him; it was filed on the 26th of July 1803, and service of it was accepted by Mr. D. as of the 13th of June preceding. The judgment was obtained on the 19th of July, and execution was issued on the 12th of August.

On the 7th of June 1806, two sums of 1702*l.* 13*s.*, and 3,812*l.* sterling, were paid by Charles Grant, and as in part satisfaction of these executions, and a receipt was given him by M'Caul.

The appellant Frankland defended this action in the Court below, on the ground that these judgments had been improperly obtained; and went into evidence, in the course of which he produced two certificates from the deputy-secretary and registrar at the Court at St. Vincents. The first was, "that after diligent search in the secretary's and registrar's office there did not appear to be any power of attorney on record in that office from Peter Grant to any person, than the power to W. H. Durham, J. M'Caul, and W. Conyngham, recorded on the 21st of December 1805." The second was "That after searching the secretary's office there could not be found any warrant of attorney to confess judgment from either the plaintiffs or defendants in the causes above mentioned." These causes were the causes in which the judgments in question had been obtained. Certified copies of the judgment-rolls of the Court at St. Vincents were

also produced, by which it appears that D. had acted as attorney for Charles Grant in two actions, which had been brought against him by Peter Grant, and had confessed judgment for him in both of them on the 10th of August 1803.

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He also proved the articles of partnership of C. Grant & Co., dated the 9th of March 1799. By this deed, it appeared that the partnership was entered into between the members of that firm, C. Grant, P. Grant, J. Grant, and T. Fraser, for the term of five years; and it contained a stipulation "that they the said parties, or any of them, had not heretofore done, nor should, nor would, during the continuance of the said joint trade, without the good-liking and consent of the others of them in that behalf first had and obtained in writing under the hand of the other of them, at any time or times during the said co-partnership, enter into any statute, recognizance, judgment, bill or bond, or otherwise become bound, or charge as bail or surety with or for any person or persons whomsoever, in any way to affect the said joint trade, or the stock, estate and effects thereof, other than in the regular course of business, or do or willingly permit to be done any act, matter or thing whereby or by means whereof the said co-partnership should or might in any wise be prejudiced, hindered, seized, attached, extended, taken in question, or encumbered with or for any part or particular debt, duty or encumbrance which should not relate to or concern the said copartnership." It was executed by all the parties in person, except Charles Grant, for whom it was executed by three persons under a power of

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attorney from him, of whom Wm. Fraser, whose executors subsequently obtained the judgments in question, was one.

The Defendant also examined by letters requisitional, Peter Grant, who was then residing at St. Vincents. He deposed, "that in September 1801, Charles Grant was, to the best of his belief, in the island of St. Vincent, and that he James Grant was absent from the island, in America. That on his return to the island he discovered that during his absence Thomas Fraser had drawn, in the name of the firm of Charles Grant and Co., several bills of exchange all bearing date the 1st of September 1801, on Charles Grant, in favour of William Fraser, the first of them being for 2,500*l.*, payable twelve months after date; the second also for 2,500*l.*, payable fifteen months after date; the third also for 2,500*l.*, payable twenty-one months after date; and the fourth for 1,112*l.* 1*s.* 4*d.*, payable twenty-four months after date; making together the sum of 8,612*l.* 1*s.* 4*d.* sterling. And that Charles Grant was in the island of St. Vincent in February 1801, and there remained until on or about the 1st of April 1802, when he left it. And that all these bills were merely accommodation bills, drawn by Thomas Fraser and Charles Grant, for the sole use and accommodation of Charles Grant, and that none of them ever passed through the books of the firm." He also identified the handwriting of Charles Grant to a writing annexed to his deposition, in which these bills were set out, and the following passage written underneath: "These bills were drawn for my accommodation, and not to be charged in account; Charles Grant." A letter was also proved from

James Grant to Peter Grant, dated at St. Vincents 25th April 1821, in which were these passages,
 “ The firm of Charles Grant and Co. was dissolved
 “ in 1802; the bills you mention were accommo-
 “ dation bills, drawn by C. Grant and Co. on
 “ Charles Grant and Co. and which he accepted.
 “ This transaction took place between Mr. Thomas
 “ Fraser and C. G. when I was in America; and
 “ when the bills were returned protested, I stated to
 “ Mr. M’Caul and yourself, as executors to William
 “ Fraser deceased the great hardship of my being
 “ made responsible for a transaction that I was
 “ perfectly ignorant of; and about that time sugars
 “ took a rise, and it was thought that Charles
 “ Grant might yet overcome his difficulties; in
 “ consequence of which Mr. M’Caul and yourself
 “ gave me a release, which I some time afterwards
 “ had recorded and acknowledged before the regis-
 “ trar by Mr. M’Caul, you having left the island—
 “ It’s a pity you did not get one for yourself at the
 “ same time. I have no doubt that your making it
 “ appear that they have not used due diligence
 “ in endeavouring to recover from C. G. will exon-
 “ erate you. Mr. M’Caul’s son came to me a few
 “ weeks ago to inquire if I knew what had become
 “ of the original bills, as he could not find them.
 “ I told him I knew nothing about them; if they
 “ are lost they cannot hurt you.

“ I remain, &c.”

James Grant was a second time also examined on the part of the defendant, and he then stated that he was not aware of the consideration for which the bills were given; but he denied having any recollection of any acknowledgment whatever to himself from either Wm. Fraser or M’Caul; that they well knew

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that the firm of C. Grant & Co., or at least James Grant and Peter Grant, were not liable in respect of the bills, because they were drawn without their privity and consent for a private debt due by Charles Grant alone to Wm. Fraser.

To show the impression that Charles Grant himself entertained of these bills at a subsequent period the defendant Frankland also produced a letter from Charles Grant to Wm. Fraser, dated London, 4th June 1802, in these terms:

“ Dear Sir,—I arrived here on the 18th ult., and
“ found all my young folks in perfect health.
“ I was extremely hurt to find that a bill of yours
“ on me for 500*l.* had been suffered to go out, they
“ say, for want of regular advice ; I have, however,
“ arranged it with your friends in Mark Lane.
“ The fall in the sugar market you will readily
“ believe has affected me exceedingly ; if my
“ sugars had not been of a superior quality it
“ would have been ruinous. I have already ex-
“ perienceed so much indulgence from you, that
“ I am perfectly ashamed to ask for any more ; but
“ the reason above alluded to will I am sure plead
“ my excuse. I have compared my wants and
“ means, and find that if the first bill for 2,500*l.*
“ was extended for six months, and the second for
“ the like sum for twelve months, I could easily
“ manage the third and fourth. I cannot have
“ your answer in time, I fear, but I can arrange the
“ matter easily with Messrs. B. and S. in the mean
“ time. If you can with propriety grant my re-
“ quest, the best way would be to draw two bills
“ on me at the extended periods, adding the interest
“ to each, which can be exchanged for the other
“ two.

" It is the general opinion here that you will
 " not suffer in the first instance by the change
 " of masters ; but the great fall in every kind of
 " West India produce must be very discouraging
 " to you as a young planter. I have seen so many
 " changes in my time, that I think the less of it ;
 " and as the expenses are more moderate, and the
 " quantity likely to be very considerable, I shall
 " yet do very well, although my anxiety in the
 " mean time is very great. I am in hopes the
 " young men in St. Vincents will be able to give
 " me a lift this year ; if they do not it will be out
 " of my power to assist them any longer.

" I am, &c.

Another ground of defence taken by the defendant in the Court below and appellant here, was that the release mentioned in James Grant's letter was also a discharge to Peter Grant. For this purpose he produced a memorandum, dated the 11th of May 1805, signed by Peter Grant and M'Caul, and afterwards acknowledged by M'Caul on the 26th of July 1808, before the deputy-registrar of the colony. By this they agreed to discharge James Grant from all liability or responsibility on account of the bills in question, and to execute such further exoneration as he might require. The release itself from M'Caul was also proved. It bore date the 26th of August 1808 ; " and after reciting the partnership of C. Grant & Co. that during the partnership, and in the absence of J. Grant, and without his knowledge, certain bills of exchange had been drawn by one of the co-partners in the name of the firm, amounting to 8,612*l.* sterling, which had been accepted by C. Grant, but afterwards protested for non-payment, by means whereof the said James

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Grant, together with his co-partners, became liable to pay the same, with all interest and damages thereon; and also reciting the will of William Fraser, and the memorandum of the 11th of May 1805; and that M'Caul was the only executor then resident in the island, and had been applied to to execute a regular and formal deed of release. It witnessed, that in pursuance of the memorandum, and forasmuch as J. Grant had not received any benefit or advantage whatsoever from the said bills, M'Caul released, exonerated and discharged J. Grant, his heirs, &c. from the payment of the said sum of 8,612 *l.* sterling, the amount of the bills so drawn as aforesaid, and all actions, or causes of action on account thereof, or any part thereof, and all judgments and executions which had been already sued forth, or might thereafter be sued forth, against his lands, for or against him individually, or jointly with any other person or persons whomsoever, for or on account of or for the recovery of the said sum of money, or the several bills drawn for the payment thereof."

Evidence was also produced to show that in 1803 M'Caul, the acting executor of William Fraser, was the attorney of Peter Grant in the island, and in habits of correspondence with him, and then prosecuting on Peter Grant's behalf in the Court there the actions before mentioned to have been brought by him against Charles Grant, and which were upon two of the acceptances given for Peter Grant's proportion of the profits of the partnership concern of Charles Grant and Co.: That in May 1805, when Peter Grant was in the island, M'Caul permitted him to receive 560 *l.* 3*s.* 1*d.* sterling, in part discharge of one of those actions; and that in

August 1805, when he was about to leave St. Vincents for Essequibo, he again appointed M'Caul as his attorney : That in June 1806 M'Caul had remitted 1,000 *l.* sterling, which he had received in further part discharge of the actions by Peter Grant against Charles Grant, to Peter Grant's agents in London, on his account ; and in 1807 he had paid Peter Grant a legacy of 200 *l.* which had been bequeathed to him by William Fraser.

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The Court of Justice at Demerara, by their decree, ordered Frankland to pay the whole amount of the sums recovered by the judgments, after deducting the amount of the payments made in 1806 in discharge of them, but they did not allow any interest on them. From this decree the present appeals were instituted.

Alderson (and the Attorney-General was with him), for Appellant in the first, and Respondent in the second Appeal.

Foreign judgments are only *prima facie*, and not conclusive evidence of the demand they are produced to establish. The defendant may either impugn the original justice of the demand, or show that the judgments have been irregularly or unduly obtained, *Sinclair v. Fraser* *. Lord Ellenborough, in *Buchanan v. Rucker* †, refused to allow the plaintiff on a judgment of this description to recover, because no due notice of action had been served on the defendant in the Court below ; and in *Sadler v. Robins* ‡, he observed that the judgments in the West India Islands ought always to be examined with strictness. Now these judgments are not such as ought to be admitted as conclusive evidence of

* 1st Douglas, 4.

† 1st Campbell, 63.

‡ 1st Campbell, 280.

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the justice of the original demands, and recourse must therefore be had to the consideration in which they were given. They are judgments by default under very peculiar circumstances. In two of the actions in which they were obtained, Mr. D., who acted as attorney for all the defendants, accepted service, as of the 13th of June 1803; in one of them as early as the 7th of March 1803, although the declarations in none of them were filed till the 26th of July in that year; and immediately afterwards he confessed judgment on all of them. The declarations in two of these actions are bad, and so bad as to be untenable in any Court of Law. The actions are against the drawers of bills of exchange. The declarations state the drawing, the acceptance, and the default in payment, and conclude with claiming the money without the slightest assertion that the drawers had any notice whatever of the dishonour of the bills, and the failure of payment by the acceptor, without which no drawers in the world would be liable. These are therefore very singular declarations for the drawers to confess judgment on, although the acceptor, Mr. Charles Grant, whose attorney alone Mr. D. in fact was, might very properly have done so. The deed of co-partnership of Messrs. Grant & Co. contained a special stipulation, that none of the partners, without the consent of the others of them in writing, should give any bill so as to affect the partnership, except in the regular course of business. Mr. Fraser, the testator under whom the present respondents claim, was the attorney who executed this deed on behalf of Charles Grant, he was therefore personally acquainted with the fact that Charles Grant had no right to bind a part of the joint property, and the partnership there-

fore would not then be liable to the payment of these bills given him in payment of a private debt. All these four bills, in respect of which these judgments were in truth confessed, were drawn on the 1st of September 1801. The whole amount for which they were drawn was 8,612 *l.* 1 *s.* 4 *d.* For some reason or other it became important to obtain judgments on them in August 1803, although the whole sum was not then due, because one of the bills had not then expired, nor would have expired, the days of grace being added, until the 3d of September in that year; but it is a very singular circumstance, that if you add together the sums recovered under the name of principal and interest on the two actions, which were brought upon the first three bills of exchange, you will find that the total almost exactly accords with the whole sum due upon the four bills. It amounts to 8,613 *l.* 3 *s.* Now the utmost they would be entitled to, by way of interest at 6 per cent upon the whole, would have been 287 *l.*, but in fact they recovered 5,825 *l.* 8 *s.* 8 *d.* upon the first two bills for 5,000 *l.*, that is 825 *l.* 8 *s.* 8 *d.* more than the principal; and 2,787 *l.* 14 *s.* 4 *d.* upon the third bill, which is 287 *l.* 14 *s.* 4 *d.* more than the principal, so that they recovered the whole sum secured by the four bills, though only three of them were actually due*.

It does not appear either that Peter Grant was in the island at the time the judgment was signed; if he were absent, one partner has no right to appear

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* According to the laws of St. Vincent, the holder of a bill protested in Europe is entitled to 8*l.* per cent interest from the date of the protest, as well as 10*l.* per cent damages on the principal sum. See Act of Assembly, 26 G. 3, s. 100.

† See Act of Assembly, 26 G. 3, s. 33.

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in a court of law for another; and the question will be whether he left a power of attorney to any one to appear for him. According to the practice of this country, before an attorney appears he must file a warrant authorizing him to do so on behalf of his client; and although certain omissions in judgments obtained in confession were cured by the statute 4th Ann. cap. 16, s. 2, yet it provides "expressly so" "as there be an original writ by a warrant of attorney duly filed." The courts have always considered the filing of the warrant of attorney as of the essence of the proceedings. The practice of St. Vincents is similar to that of this country. The registers of the court there have however been searched by the proper officer, and no power of attorney has been found from Peter Grant to authorize Mr. D. to appear as his attorney, and Mr. D.'s choosing to come forward and confess judgment for Peter Grant is not sufficient to bind that gentleman at any future period. The circumstance of nothing whatever having been done to carry these judgments into execution from 1803 to 1823, is very suspicious, and no reason has been attempted to be given by the opposite side to account for this long delay. They have not chose even to examine Mr. D., who might have told us whether he was ever authorized to act on behalf of Mr. Peter Grant or not.

In the letter from P. Grant and M'Caul to James Grant, dated the 11th of May 1805, which evidently was written by M'Caul alone, though it is signed by P. Grant, no mention whatever is made of these judgments, although it contains an express release from liability on account of the bills in respect of which they were given. How came

Mr. M'Caul, a year and a half after obtaining these judgments, never to mention them in a letter of this description to J. Grant? But it is evident that even in 1823 J. Grant did not know of the existence of these judgments, for in his letter of the 25th of April 1821, he says "if the bills are lost they cannot hurt you." How is that consistent with his knowledge that judgments had been obtained upon those bills? But if J. Grant knew nothing of these judgments, he never could have authorized Mr. D. to have confessed them for him, and yet Mr. D. appears equally for him as for Mr. P. Grant. If he appeared for one without being authorized, it is a reasonable presumption that he appeared for the other without authority also. There is fraud upon the face of the transaction, and these judgments cannot be supported. On the 26th of July 1808 M'Caul gave Peter Grant a general release of the whole of the demand upon those bills; and although in that instrument there is a general release from all judgments and executions, yet there is no mention of these particular judgments which had been obtained on these bills. The words "judgments and executions" were introduced as mere words of course. But this release contains a recital that Charles Grant had given these bills of exchange without the knowledge and consent of his partners, and this recital is binding upon M'Caul, who is now suing upon them.

There is also a technical objection to these judgments. Before they were obtained Mr. Peter Grant was the executor of William Fraser. An appointment of a person as executor is a release at law, and even in some circumstances in equity.

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But in a Court of Law, if it appears that the parties are co-executors it puts the plaintiff out of Court. This observation applies to all the actions, the former only could to the two first upon the bills of exchange; but as to this judgment in the action for goods sold and delivered it was the first (in order of date); and in the absence of all proof to the contrary your Lordships will presume that the payments which have been made were in satisfaction of that judgment. There can be but little doubt but that these judgments were a fraud on the part of C. Grant and Mr. D.; and if there wanted another circumstance to prove it, it would be found in this, that four days after Mr. D. had acted as attorney of all the partners in confessing these judgments, he appeared as the attorney of Charles Grant alone in an action brought against him by Peter Grant. M'Caul appears also on the evidence to have received 1,000 *l.* on account of Peter Grant; at that time, according to the respondent's story, Peter Grant was indebted to him as executor of Fraser in a much larger sum; but notwithstanding this he paid over to him the whole of it, and also a legacy which was left him. Can one conceive that M'Caul would have acted in this manner if he had conceived Peter Grant to have been liable on these judgments. These judgments we therefore submit cannot be supported. But if they should be good, and the judgment of the Court below should be affirmed, there is no ground for the cross-appeal in respect of the interest. The other side contend that they are entitled by the law of St. Vincents to recover 6 per cent interest on the judgment. Now the law of St. Vincents was a fact to be proved by evidence

before the Court below. No evidence was given of it, and therefore they cannot succeed upon that ground.

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We do not deny that at common law the jury may award interest in the nature of damages, as in *Blackmore v. Fleming* *, and that the court of Demerara, which performs the functions both of judge and jury, might have done the same. That court however has not thought proper to do so; and they were well warranted in their refusal by the laches and negligence of the respondents in not enforcing their judgments for a period of nearly twenty years. If a jury in England, under similar circumstances, had not given interest, they would have been held by the King's Bench to have exercised a sound discretion *Du Belloir v. Lord Waterpark* †. If the court should think proper, therefore, to confirm the judgment below, we hope they will not vary it in this particular.

Stephen (Serjeant), and *Henry*, for the Respondents in the first, and Appellants in the second appeal.

It is most important for the practice of this court that no objections should be taken here which have not been previously taken in the Court below. In the Court at Demerara the whole controversy was whether the bills had or had not been obtained improperly, and without sufficient consideration; and that this was the only question in dispute appears from the judgment of Mr. Crole, who was one of the judges, and dissented from the decision of the other judges on that occasion. The second

* 7 T. R. 446.

† Bailey on Bills, cap. 9, s. 1, p. 281.

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of the appellants reasons in his petition to the Court below for leave to appeal states indeed " that the said supposed judgments or sentences " of the Court of King's Bench and Common Pleas " in St. Vincents are erroneous, defective, null and " void by virtue of the many and various inform- " lities, irregularities and errors, of which there " is *prima facie* evidence upon the supposed records " themselves; and therefore no action could or " ought ever to have been had or maintained upon " them, or any of them." But that is a mere general assignment of error too loose and vague to found any specific objection on. Not a word is to be found in either this judgment of Mr. Crole, or the reasons of appeal, of the effect of making Mr. P. Grant an executor of Mr. W. Fraser, or of the want of authority in Mr. D. to confess the judgments, or of any of the other specific technical errors now first discovered in the record. These points have therefore been taken too late, and cannot be persisted in here.

The appellants principal reliance was on the affidavit of Mr. J. Grant; and it is difficult to conceive on what principle of the law of evidence his affidavit was received. His evidence, however, is by no means satisfactory; for though he says that the bills were drawn by P. Fraser, yet he does not swear that he had not given authority to P. Fraser to draw the bill, nor that the judgments were confessed without his authority, or that Mr. D. confessed the judgments without authority. The other evidence is the unsworn certificate of the deputy-secretary of St. Vincents, in which he states, " that after searching the secretary's office he cannot find any warrant of attorney to confess judgments from either the plaintiffs or defendants in the above

causes." It is a mere certificate under hand; he does not state it to be the constant practice of the island to file such warrants of attorney; he does not state that the warrants of 1803 were at that time extant, or that a single warrant of that date was filed in the island; he does not even say that he had made diligent search. This evidence cannot be held as conclusive. It is then argued from circumstantial evidence that M'Caul kept the circumstance of these judgments having been obtained a secret from Peter Grant. No man could reasonably expect to keep that a secret which was registered on the public records of the island; but there is no evidence that Peter Grant was not in the island at the time these judgments were confessed; and that he was not well acquainted with them. He certainly was with the amount for which they were obtained, as appears by the memorandum which he joined with M'Caul in giving to James Grant.

What then is the situation of the parties? Here were authenticated judgments of the court of St. Vincents, produced in the court of Demerara to substantiate the plaintiff's claim to a certain sum of money. Had no suit been commenced upon those judgments, but merely letters requisitorial from the judges at St. Vincents been produced to the Court at Demerara, requesting them to carry those judgments into execution, that court ought, according to the Dutch law, to have executed them; but although a suit was commenced upon them, that Court had no right to inquire into the merits of the cases upon which they had been given, but ought to have presumed those cases to have been justly and equitably decided, unless the decisions had been contrary to their own law on immov-

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able property, or appeared clearly on the face of them to be void; *Voet, ad Pand. tit. de re judicata**.

The practice of the English Courts resembles that of the Dutch on this subject. In *Buchanan v. Rucker*, where it appeared on the proceedings that the defendant was out of the jurisdiction, and had never been served with notice of the action, and in *Sadler v. Robins*, where the judgment was imperfect on the face of it, Lord Ellenborough refused to enforce the judgments of two foreign Courts; but the case of *Walker v. Whitter*†, decided that a plaintiff on a foreign judgment need not show the ground of it; and all that was decided by *Sinclair v. Fraser*‡ was, that it lies on the defendant to impeach a judgment of this description, if it can be impeached at all. The judgments in this case, however, stand upon higher ground than the judgments in any of these reported cases; it is a judgment by confession; and how can a man now come to deny what he formerly in a Court of Justice has admitted to be true. If the judgment had been in a contested case he might have opposed it, because it was wrongly decided; if it had been given by default, he might have argued, that had he been present he could have shown good grounds of defence; but no one has ever yet been allowed in a Court of Justice to oppose the execution of a judgment, the justice of which he himself has confessed.

The argument that these bills were accommodation bills is of no avail against the holder of them, unless you can prove that he was aware that they were of that nature when they came into his possession. *Primâ facie* a bill drawn by a partner in the

* L. 42, tit. 1, No. 4. † Douglas, 4. ‡ Douglas, 6.

name of the firm, for a separate debt of his own, is binding upon all his co-partners, unless it can be shown that the person to whom it is given knew at the time that it was drawn without the knowledge or authority of the other partners, *Ridley v. Taylor* *. Nothing was proved in this case to show Mr. William Fraser to have known that Charles Grant had not authority to draw bills; nothing that all the other partners (except, perhaps, James Grant) were not aware that he was so doing, and that he was acting with their consent. Thomas Fraser certainly was aware of these bills, for he took a part in the formation of them; and there is no evidence that Peter Grant was not in the island at the time. The private agreements between the partners themselves as to the manner in which these bills were to be held amongst themselves in settling the partnership accounts, can have no effect upon the holders of them, unless the holder can be proved to have been conusant of the agreement.

The release granted by M'Caul to James Grant in respect of these bills would not amount to a discharge of the judgments on which satisfaction had been entered up, even supposing the transaction to have been a fair one; but we submit that this release having been given without consideration by one only of the executors, was a fraud on the co-executors and the residuary legatees of William Fraser, and consequently void, *Mount Stephen v. Brooke* †, *Legh v. Legh* ‡. It is observable, too, that this release, though abounding with recitals that the bills were drawn without James Grant's knowledge and consent, and that he was absent from the island

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* 1st Chitty Repts. 390.

† 1st Bos. & Pull. 447.

‡ 13 East, 175.

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at the time, (which prove the fraudulent nature of the transaction), expressly admits his liability to pay them; and if he was liable, Peter Grant must *à fortiori* be held liable also.

These arguments can only apply to the two last judgments. On the first, for goods sold and delivered, no question can arise, except as to the power of D. to confess it; and on all of them we hope not only that the decree of the Court below will be confirmed as to the principal sums recovered by them, but that your Lordships will also grant the interest on those sums from the date of the judgments.

In England interest would have been recoverable in an action of this description, in the shape of damages; *Blackmore v. Flemyng**. In that case there had been a lapse of 17 years from the obtaining of the judgment to the institution of the action for enforcing it, yet the Court held that a jury might give interest upon it as damages for the detention of the sum which ought to have been paid under it. There is nothing in the conduct of the executors of William Fraser to disentitle them to interest in this case. The executions that were taken out in St. Vincents were never carried into effect, because executions in the West Indies are taken out and not levied, but kept for securities, as we are told in the report of the commissioners for inquiring into the administration of justice there †. When Peter Grant was in the island too, there were good reasons for not enforcing these executions against him, as Charles Grant appears to have paid two large sums under the judgments. After he had left it, there is no evidence to show that the executors knew where he was, till they commenced their proceedings at Deme-

* 7 T. R. 446.

† 1st Report, p. 39.

rara against him. According however to the law of Holland, by which the Court below were bound to decide, the executors were clearly entitled to interest, for by that law, as Voet tells us "*Usuræ adjudicandæ sunt post litem contestatam ubique omnino*" ‡.

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[*The Attorney General in reply.*]

There is no doubt that judgments fairly obtained in a foreign country, according to the forms of that country, are *prima facie* evidence of a debt. It is part of the general law of nations; but a late occurrence shows with how much caution actions of this description ought to be watched. An attorney obtained a judgment according to the regular forms here, against a gentleman in his absence. He then followed this gentleman to the Continent with the judgment in his pocket, and proceeded against him there upon it; some doubts arose in the minds of the authorities there as to the effect of this judgment in England, and an application was made upon the subject to the British ambassador; he submitted the questions to the opinion of lawyers here, and before an answer was returned to them the judgment was set aside in the Court of King's Bench for fraud. Judgments which have been obtained on confession, or on *ex parte* proceedings, ought always to be scrupulously examined. In this case the judgments never ought to have been obtained. Peter Grant was one of Fraser's executors, and therefore could not be sued by the other executors in a Court of common law. No notice was ever stated in the declarations in two of them to have been given to the acceptor of the bills. These objections more pro-

* Comm. ad Pan. lib. 22, s. 1, n. 11.

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perly, perhaps, ought to have been taken on a writ of error, but they were so flagrant, that when these judgments, obtained by confession, were sued upon, the Court below were bound to take notice of them.

[*Master of the Rolls*.—These objections were not taken in the Court below.]

[*Attorney-General*, in continuation.]

There is a general allegation of error sufficient for our purpose in the petition of appeal. Although the Court below has not transmitted an account of the objections taken there, yet this Board is bound to see them if they appear on the face of the proceedings. A point of this nature occurred in an appeal before your Lordships from Jamaica. The name of the cause was *Campbell v. Fowler*. The action had been brought by the owner of certain sugars, of the value of 15,000 *l.*, which had been burnt, against the agent at Kingston of the merchants in London, who had the charge of them, for not having insured them. In the course of the proceedings it appeared, that the defendants had insured the sugar in their warehouses at three successive periods of three months, and had charged that insurance to their employers; but that they had not renewed the last insurance, and within a month after its expiration the sugars had been destroyed by fire. A commission was sent to this country to examine witnesses; almost all the merchants and brokers in London were examined upon the subject of the practice as to insurance. It appeared that a great many did insure, and a great many did not. The cause was tried in Jamaica, and a verdict was found for the plaintiffs. The defendant neglected to move for a new trial, and the question was raised by a bill of exceptions to the summing up of the judge, saying

“ that he had left all the case to the jury ; whereas he ought to have stated that there was no obligation of law upon a merchant to insure ; and that the obligation, if any, being founded entirely upon custom and usage, where one half of the merchants prove the affirmative, and one half the negative, the result was that there was no obligation at all.” When it came before this Court upon the bill of exceptions, several common-law judges were present at the hearing. The question was argued by Lord Erskine, by Mr. Serjeant Shepherd, Mr. Gibbs, Mr. Baron Wood, and myself. It occupied several days, and there was a general feeling that the proceeding was wrong ; but the difficulty was how to get rid of the mistake of the counsel, who instead of moving for a new trial, upon the ground that the jury had found a verdict against evidence, had tendered a bill of exceptions upon a supposed misdirection of the judge, when the judge was right in leaving the facts to the jury, but the jury had drawn wrong conclusions. At last, after four several discussions, it fell to the lot of Mr. Gibbs to hit upon the true objection, which was, that upon the face of the record itself it appears that one of the counts of the declaration had stated the obligation to have been at common-law, and therefore the verdict having been general on all the counts, there was good reason to arrest the judgment.

Lord Ellenborough laid hold of that point ; this Court coincided with him ; and upon that objection, started here for the first time, the judgment was reversed. This case shows that when an objection arises upon the record it has been taken in this Court, although it has not been taken in the Court below.

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Seemle, that objections cannot be made before the Privy Council on appeal which have not previously been made in the Court below.

MASTER of the ROLLS :—

It would be very inconvenient if such a rule were adopted with regard to legal proceedings in other countries. It is very well in Courts of Appeal in this country, because both the supreme Court and the inferior Court proceed according to the law of this country ; but in an appeal from a foreign country it does not follow that the law of England is to be applied. There is the particular law of the country, and the usage of the country. If the objection had been taken below it might have been explained either by the law of the country, or the usage of the country. The Dutch law, for instance, prevails in the colony from which this appeal comes. How are we to determine questions according to the English law upon a new objection not stated in the Court below? We cannot assume that the English law prevails in these particulars, when the objection has not been taken below. With respect to what you stated as to Peter Grant being an executor, and that therefore the only remedy against him was in a Court of Equity, if there is no Court of Equity in Demerara, how is that difficulty to be got rid of? there must be some provision in the Dutch law which will get rid of that difficulty: here we get rid of it by resorting to a Court of Equity.

Attorney General :—

We do not dispute the power of his co-executors to sue Peter Grant in the Court of Demerara, which acts as a Court of Equity as well as a Court of Law but we say that they had no right to sue him in a Court of common law at St. Vincents, and that and the other errors on the records from thence are sufficient

ground for the Court of Demerara, or at any rate for this Board not to enforce these judgments.

[*Master of the Rolls.*—The clear answer to that is, how can a man who has confessed the action take objections to the judgment?]

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Attorney General in continuation :—

There is no proof that D. had authority to confess these judgments. By the law of St. Vincents *,

“ Where any judgment is entered upon confession,

“ *nihil dicit*, or *non sum informatus*, the counsel who

“ confesses such judgment shall leave his warrant

“ of attorney in the secretary’s office in the island,

“ in order to have the same recorded at the time he

“ confesses such judgment, or in default thereof,

“ or in case it shall appear such warrant of attorney

“ was irregularly confessed, such judgments,

“ and the execution, if any issued thereon, shall be

“ of no force, virtue or effect whatever, any law,

“ usage or custom to the contrary notwithstanding ;

“ and the secretary, or his deputy, is hereby required

“ to give to the counsel who shall leave such

“ warrant of attorney with him for the purpose

“ aforesaid, an acknowledgment in writing, signed

“ with his hand, of the receipt of such warrant of

“ attorney, mentioning as near as may be, the day,

“ hour, and minute he received the same ; and the

“ secretary or his deputy is hereby further directed,

“ with all convenient speed, to record the said warrant of attorney in his books to be kept for that

“ purpose.” Now we have the certificate of the secretary and registrar that no power of attorney

* Act of Assembly, 26th Geo. 3, clause 33.

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from Peter Grant is to be found authorizing Mr. D. to confess this judgment. If it was to be found, or the acknowledgment of the secretary of the receipt of it could have been discovered, the plaintiffs in the court below ought to have produced it. At *Nisi Prius* here, in actions upon foreign judgments, the powers of attorney to confess them, if they have been obtained on confession, are constantly obliged to be produced; even although the judgments are from Jamaica, where legal proceedings are conducted with more regularity than any other of our colonies. Every presumption is against Peter Grant having given such a power; there is no proof even of his having been in the island at the time, and although there may be cases in which one partner may be authorized to enter up judgment for the others, yet evidence must be given of such authority, and none is offered for that purpose here.

The original consideration in respect of which judgment was given in two of the cases at St. Vincents was bad. A partner has no right to bind the partnership property for his private debts, and a security given by him to a third person in the partnership name for that purpose is invalid as against the partnership, unless the other partners have consented to its being given, and then the party suing on such a security is bound to prove their consent. In *Ridley v. Taylor*, the person taking the security had good reason to believe that it was given with the consent of the other parties. In this case no evidence is offered to show such consent, and there is every reason to disbelieve that it was ever given.

The Master of the Rolls intimated, that as there appeared to their Lordships considerable doubt upon

the question, whether, when a security had been given in the name of a partnership for the separate debt of one of the partners, it was incumbent or not upon the party suing upon such a security to produce evidence of the consent of the other partners, they would not then pronounce judgment, and that he would undertake to examine the cases* upon the subject.

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MASTER of the ROLLS:—

I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction which may afford the separate creditor a reasonable ground of belief, that the security so given in the partnership name, is given with the consent of the other partners; and those circumstances occurred in the case, which was cited, and which seemed to be inconsistent with the other authorities. I refer now to the case of *Ridley v. Taylor*. In that case the bill was dated eighteen days before its delivery by the partner to his separate creditor, and it was not known by the creditor that it was drawn and indorsed by the debtor alone; and the bill was to a greater amount than the separate debt. The Court therefore were of opinion, that there was reasonable ground for the separate creditor

8th May.

* The following are some of the later cases on this subject; *ex parte Agace*, 2d Cox, 312; *ex parte Bonbonus*, 8 Vesey, 540; *Green v. Deakin*, 2 Starkie, 347; *Lord Galway v. Mathew*, 10 East, 264; *Wells v. Masterman*, 2 Esp. 731

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believing it not to have been given to him in fraud of the partnership, and that the general presumption, that a partnership security when applied in payment of a separate debt is in fraud of the partnership, was repelled by the special circumstances which belonged to that particular occasion; upon a consideration, therefore, of all the authorities, I am of opinion that the law is, that taken *simpliciter* the separate creditor must show the knowledge of the partnership; but if there are circumstances to show a reasonable belief, that it was given with the consent of the partnership, it lies upon the partners to prove the fraud. I think that will reconcile all the cases.

Mr. Serjeant *Stephen* then requested and obtained permission to re-argue the case.

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Mr. Serjeant *Stephen* submitted that there were circumstances to prove the consent of the other partners to the drawing of the bills. Peter Grant, in the memorandum of July 1805, agreed to discharge James Grant from all liability or responsibility on account of them; he thereby admitted that James Grant was liable, and if James was liable, Peter must be also. Every man must be held to be conusant of law, and therefore it could not be argued that Peter Grant was mistaken as to his legal liability. The release was given, as appears on the face of it, not because James Grant was not liable, for then it would have been useless, but because it was considered a hardship upon him to pay bills he had received no benefit from. James himself expressly denies any acknowledgment from either Fraser or his executor that he and Peter were not liable. The letter of Charles Grant in 1802, was rather evidence that he considered the partners in St. Vincents liable, for he says he hopes they

will be able to give him a lift. There is no evidence that Peter Grant was out of the island at the time these bills were drawn; if he was, he might have given his consent in writing to their being made, and it would be reasonable to presume he had done so. There is no evidence that the judgments were improperly obtained, except the unsworn certificates from St. Vincents. The admission of these certificates as evidence was contrary to the principles both of the Dutch and English law. Van Leuween* says, "It is not sufficient to the evidence and credit of witnesses that they declare in writing before a notary and two witnesses, or otherwise confirm with their signature such matters to be the truth, but they ought to confirm it with their oath." Voet† tells us, that witnesses ought to be produced and sworn before they give their testimony. In Phillips on Evidence‡ we find the general rule of the English law stated to be never to allow a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. There was no instance known in which a certificate that a record could not be found had been admitted as evidence in our Courts. Independently however of the inadmissibility of these documents as evidence, and the vague terms in which they were drawn up, there was proof of their inaccuracy from the papers before the Board. Two judgments were recovered by Peter Grant against Charles Grant in 1803. M'Cawl appears from the proceedings in the causes in which these judgments were obtained, and which are in evidence in this case, to have acted as Peter

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* Roman-Dutch Law, book 5, cap. 20, s. 25.

† Comm. ad Pan. lib. 22, tit. 5, s. 15.

‡ Part 1, c. 6, s. 2, p. 381.

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Grant's attorney; in thus acting, he must therefore have had a power of attorney from Peter Grant; and yet one of these certificates stated that no power of attorney was to be found from Peter Grant, except one granted in 1805. The Court of St. Vincents would have been perfectly justified in following the course, which, according to Salkeld *, our own Court of King's Bench formerly pursued; and when an attorney took upon himself to appear, looked no farther, but supposed him to have had sufficient authority: if he had not that authority, it was the business of the other side to have applied to the Court at St. Vincents to set aside the judgments on the ground of fraud. This however they have never done; and after a lapse of nearly twenty years, the Court at Demerara were right in supposing those judgments to have been fairly obtained; and in giving a decree for the respondents, not only in respect of the judgments on the bills of exchange, but also on that for goods sold and delivered. The very point that it was necessary for a plaintiff in an action on a foreign judgment by default, to prove that the defendant's attorney in the Court in which it was obtained had been duly constituted, was made in *Molony v. Gibbons* †, and immediately over-ruled by Lord Ellenborough. If their Lordships affirmed the judgment of the Court at Demerara, it was hoped they would grant interest on the St. Vincents judgments, for which, besides the case of *Blackmore v. Flemyng* ‡, which had been already cited, the case of *M'Chure v. Dunkin* § might be mentioned as an authority.

* Anonymous, 86. † 2nd Campbell, 503. ‡ 7 T. R.

§ 1st East, 436.

MASTER of the ROLLS :—

This was an appeal against a decree pronounced in Demerara upon judgments given in St. Vincents, in respect of considerations arising in that island. The considerations were in part alleged to be composed of certain bills given by Mr. Charles Grant, in the name of the partnership firm, of which he was one, to Mr. Wm. Fraser, in respect of his individual debt. Upon the original argument it seemed to be admitted that it was extremely doubtful upon the evidence received in the Court below, upon which alone this Court could proceed, whether these judgments (that were judgments by confession) had been duly authorized by all the partners of the firm in whose name the bills had been given; and it therefore seemed to be admitted at the Bar, as it was considered by this Court, that the justice of this case would depend upon the facts, of whether or not the original consideration for these judgments ought, or ought not, to have prevailed as founding a legal claim.

The counsel seemed to be perfectly satisfied with a reference to one of the members of this Court to examine what the law was in that case, it having been admitted here that there was no direct evidence whether these bills had been given with the assent of the partners, or whether they had not been given with their assent; and the question therefore was, when bills had been given by an individual partner in the name of the partnership firm, for his individual debt, upon whom the burden of proof laid to show that the other partners did not assent to the formation of those bills.

Upon the consideration of that question, and ex-

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Examining all the authorities, it appeared to the member of the Court who had the duty of that examination, that *simpliciter* bills drawn by one partner for a separate debt in the partnership name could not be recovered upon as against the partnership firm ; but that the person claiming payment of the bills must prove either a direct assent of the other partners to the formation of the bills, or if not such direct assent, that there were some circumstances in the transaction, from which the party taking them might reasonably infer, that they were given with the consent of the other partners.

Now in this case it appeared, that there were no circumstances, from which it could be inferred, that the bills had been given with the assent of the other partners. Indeed, there was demonstration that they had not been given with the consent of all the other partners, because one of them, James Grant, was not in the country, and a release had been given to him by the executors of Mr. Fraser on the express ground, that he was absent from the island, and that he was not privy to the transaction of the bills. And it further appeared, that these bills were never entered in the partnership books, as being a debt due from the partnership. When the Court however stated its opinion, that there could not be a recovery upon the alleged original consideration for those bills, the counsel on the part of the respondent, with a laudable zeal for his client, suggested, that there were considerations on the subject which had been omitted in the former argument, and which he was desirous of an opportunity of suggesting to the Court ; and the Court, although it was a dangerous precedent, indulged the counsel with hearing a further argument upon the subject.

Upon the present consideration of the question, what is there new in the facts which are brought before the Court with respect to that point, to which alone their attention is to be directed, namely, the question, whether these bills were or not drawn with the assent of the partnership? In the first place it was suggested, that in the release to James Grant, to which I have referred, it was stated, that he was liable to these bills, and it was argued that James Grant could only be liable to those bills, by having assented to their indorsement at the time they were drawn, or subsequently; and that it must be inferred, that if James Grant had assented, Peter Grant must also have assented. It is true, that the term liability is contained in the release, but upon looking through that instrument it is perfectly plain, that that term means nothing more than that *primâ facie* James Grant was liable, because the bills were drawn in the name of the partnership firm, by a partner, who *primâ facie* is authorized to draw bills; but it is expressly stated at the commencement of it, that James Grant was absent from the island, and that he was wholly ignorant of the transaction; and in giving his evidence, (which has been read by the learned counsel who has this day addressed the Court), James Grant, in answer to the question put to him with respect to the consideration that he gave for this release, says he paid no pecuniary or other consideration, and obtained the discharge mentioned in the interrogatory, which is the release in question, "in consequence of his absence from the island, "and the knowledge that the party executing the "same had, that he this deponent was not aware

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“ of or privy to the transaction of the bills.” The release therefore is here stated to have been given, (as in truth it might be well considered to have been) expressly upon the ground that he was not legally liable, and that the term liability meant only that *prima facie* liability, which every partner is under upon a bill drawn in the partnership name.

It was further said, that there was a letter to Charles Grant who drew these bills to William Fraser, (to whom those bills were given for the separate debt of Charles Grant), which had been relied upon on the part of the appellant, but which when truly considered would afford evidence not in favour of the appellant, but of the respondents. Now upon considering that letter, it appears to have been very properly quoted on behalf of the appellant, as affording a strong inference that Charles Grant, by the terms there used, admitted these bills to have been drawn for his separate debt, and that his partners were not liable in respect of these bills; for the language is “ I have compared my wants and “ means, and find that if the first bill for 2,000 L.” (which is the first of these four bills in question) “ was extended for six months, and the second for “ the like sum for twelve months, I could easily “ manage the third and fourth.” This language admits, that he Charles Grant was alone liable for the payment of these bills. Then he proceeds, “ if you can with propriety grant my request, the “ best way would be to draw two bills on me at the “ extended periods, adding the interest to each; “ which can be exchanged for the other two.” What therefore does this admit? Although you have these two bills drawn in the partnership name,

what I now request you to do is not to renew these bills in the partnership name, but to draw two bills upon me at the extended periods.

This affords an unquestionable inference that he considered these bills as his separate transaction, and not as a demand upon the partnership. But that is not all; in a subsequent part of the letter there is an expression, that has been relied upon on the part of the respondents, but which appears to afford a directly contrary inference to that drawn from it by them—"I am in hopes that the young men in St. Vincents will be able to give me a lift this year, if not it will be out of my power to assist them any longer." Who are the young men in St. Vincents? They are the partners, whose names were upon these bills, and who appeared on the face of these bills to have been liable to the payment of them. If they were really liable, if they had assented to the formation of these bills, is this the language that Charles Grant would have used in speaking of the assistance that he expected from them? Would he not have said, I will compel these persons to assist me, in order to secure the payment of these bills? but the expression shows he expected no assistance from them in the discharge of these bills, except what might be derived from their kindness and indulgence.

Upon these facts therefore, that have been very strongly pressed upon the attention of the Court, the Court is but the more confirmed in its opinion, that by the original concoction of these bills it was not meant to involve the partnership firm, but that they were bills given for the separate debts of Charles Grant, and which he was in law alone liable to pay.

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It has been said, that if the decree could not be sustained in respect of the bills, yet it could be sustained in respect of the judgment for goods sold and delivered. It was very fairly admitted at the Bar, that the judgment in respect of the goods sold and delivered could not be maintained, if the opinion of the Court was that it had not been legally confessed. Now the only evidence to guide the Court in its determination upon that point, are the certificates, the reception of which, as evidence, has been so much complained of. There is nothing, however, to satisfy us, that they were improperly received below, and therefore we are of opinion, that we are bound to receive them as evidence here. They might have been objected to below, and if objected to, they might have been amended by the oath of the party*. Upon the whole, the Court feels therefore, that the judgment in favour of the respondent must be reversed.

* Unsworn certificates under tender of oath have been constantly received as evidence in the Courts of Demerara and Berbice, it being optional with the party against whom they are used to require them to be sworn. See the answers of the presidents and fiscals of those Courts to the questions on that subject of the Commissioners of Inquiry into the Administration of Justice in the West Indies, in their 2d Report, p. 73, and their remarks on the practice, p. 8. See also Van Leuwen's Roman-Dutch Law, Book 5, cap. 20. s. 30.

C A S E S

ARGUED AND DETERMINED

BEFORE THE

LORDS OF THE PRIVY COUNCIL.

ON APPEAL FROM JAMAICA.

FRANCIS WHITTLE - - - - *Appellant.*

And

DONALD M'FARLANE - - - - *Respondent.*

FOR some time previously to the year 1811 the appellant Whittle had carried on business in the city of Kingston, in co-partnership with a gentleman of the name of Campbell, under the firm of Campbell & Whittle. In that year the house of Campbell & Whittle agreed to take the respondent M'Farlane, who had been their clerk, into partnership. Articles of co-partnership were thereupon executed between them and M'Farlane, and the partnership of Campbell & Whittle having ceased on the 31st of December 1811, that of Campbell, Whittle & Co. commenced on the 1st of January 1812, and it continued until the 31st of December 1814, when it terminated, and a new partnership was formed between Campbell and the respondent M'Farlane, to which the appellant Whittle was not a party. This new partnership was carried on under the firm of Campbell & M'Farlane. It commenced

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In taking the accounts between three partnerships, the first, of A. & B.; the second, of A. B. & C.; and the third, of B. & C.: the partnership of B. & C. cannot charge commission for collecting the debts due to the two preceding partnerships.

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on the 1st of January 1815, and was dissolved on the 8th of March 1818.

The respondent M'Farlane in 1822 commenced a suit in the Court of Chancery in Jamaica against the appellant Whittle and the representatives of Campbell, (who was then dead,) for the purpose of having the accounts taken of these three co-partnerships. A reference was directed to the Master for that purpose; and on the coming in of his report the appellant filed three exceptions to it, all of which were overruled by the Court. From their decision he appealed to the King in Council.

The first of these exceptions related to the method of taking the accounts, and was argued at considerable length; it depended chiefly however upon the facts of the case, the general principles of law applicable to it having been admitted on both sides. From the absence however of a mortgage-deed, on the wording of which the determination of it depended, and which was obliged to be sent for to Jamaica, no decision was made upon it until eight months after the first hearing. The other two exceptions were,

“ For that the Master had allowed the respondent, in the accounts of the firm of Campbell & M'Farlane with the firm of Campbell & Whittle, credit for interest commissions upon the several sums of money belonging to the said last-mentioned firm, received by the said firm of Campbell & M'Farlane.

“ For that the Master had allowed the respondent, in the accounts of the firm of Campbell & M'Farlane with the firm of Campbell, Whittle, & Co., credit for interest commissions upon the several sums of money belonging to the said last-

“ mentioned firm, received by the said firm of
 “ Campbell & M'Farlane.”

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Pemberton (K. C.), and *Burge*, for the Appellant:—

The firm of Campbell, Whittle, & Co. consisted of the same persons as that of Campbell & Whittle, with the addition of M'Farlane; the firm of Campbell & M'Farlane, of the same persons as that of Campbell, Whittle, & Co., with the exception of Whittle. The Master has therefore proceeded on the principle, that continuing partners have the right of charging to a retiring partner commission upon all debts of their former partnership, which they may get in. Such a charge has never been known to have been made in England, and there is no proof of, nor indeed, in point of fact, is there any local usage to sanction it in Jamaica. Inquiries have been made on the subject, and the answer to them has invariably been, that no such charge has ever been heard of there. It would be difficult indeed to find upon what principle this charge could be supported. No provision was made upon the termination of each partnership, that the succeeding one should be considered as agents to the former, and in that capacity entitled to charge commission, and without such a provision it is clear, that the partnerships must be considered to stand in the relation of debtor and creditor to each other, and not in that of principal and agent. In fact, the debts due to the former houses formed in a great measure the capital, with which the succeeding houses carried on their trade. The bill contained no prayer for such a commission, and there was no direction in the decree to authorize the Master to allow it, much less to allow interest upon

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it, a charge which, even if the commission itself was allowed, could not be maintained.

Pepys (K. C.), and *Rennals*, for Respondent :—

Although there is no evidence that such a charge of commission is warranted by the local usages of Jamaica, yet we may safely imagine that it is so, when we find it allowed by the Master, who must be conversant with the course of mercantile dealing in that country, and his report confirmed by the Court. Independently, however, of the question of usage, this charge can be supported upon principle. The succeeding firms acted as the agents of the preceding in getting in their outstanding debts, and as such agents were entitled to their commission, Mr. Whittle, who now objects to this charge, on the part of the house of Campbell and M'Farlane, against the two prior houses of which he himself was a member, is allowed by this report, as a partner in the house of Campbell, Whittle, & Co., commission for collecting the debts of the house of Campbell & Whittle ; and it is but fair that if he receives it in the one case he should pay it in the other. As to the question of interest, the decree directs the Master in taking the accounts between the partnerships to strike annual balances, and to allow 6l. per cent interest on those balances. The sums allowed by way of commission would of course form part of these balances, and the Master was therefore justified in allowing interest upon those sums, as well as on the others composing the balance.

MASTER of the ROLLS:—

It is impossible to maintain the charge for commission, because it is in truth a charge by a partner for the collection of a partnership debt. How can a partner charge commission against a partner for the collection of a partnership debt, in which both of them are interested? It is a misapprehension entirely, and there does not appear any pretence for saying, that there is any local usage in the island to sanction such a charge. If commission cannot be charged, of course interest upon commission cannot be charged. The Court will therefore refer it back to the Court below, with a declaration that no commission could be charged either for the collection of the debts of first or second partnership.

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6th March.

ON APPEAL FROM THE SUPREME
COURT OF JUDICATURE AT BOMBAY.

The Hon. MOUNTSTUART ELPHINSTONE and HENRY DUNDAS ROBERTSON - - - - - } *Appellants.*

And

HEERACHUND BEDRECHUND, and }
JELMEL ANOOPCHUND, Executors } *Respondents.*
of AMBERCHUND BERDACHUND - }

3 & 19 June,
14 July,
1830.

The members of the provisional government of a recently conquered country seized the property of a native of the conquered country, who had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities. Held, that the seizure must be regarded in the light of a hostile seizure, and that a Municipal Court had no jurisdiction on the subject.

THIS was an appeal from a judgment of the Supreme Court of Bombay, dated the 6th of February 1827, awarding to the respondent 1,745,290 rupees, 3 quarters, 32 reas, damages, and 16,303 rupees, 3 quarters, costs. The action in which it was given had been brought in trover by Ameerschund Berdachund against the appellants and the East India Company, for the recovery of damages for the seizure of treasure to a large amount from Narroba Outia, a nobleman of high rank under the Mahratta government, and formerly treasurer to the Peishwa, to whom Ameerschund was executor. The circumstances under which the seizure took place appeared on the trial to be as follows :

On the 16th of November 1817, after the battle

Semle.—The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional government ; and that Courts of Justice under the authority of that government were sitting in it for the administration of justice, do not alter the character of the transaction.

of Kirkee, the Peishwa, Bajee Row, left his capital, Poonah, which was the next day taken possession of by the British forces. On the 15th of December 1817, the Marquis of Hastings, the Governor-General of India, appointed the appellant Elphinstone sole commissioner for the settlement of the territory conquered from the Peishwa, with authority over all the civil and military officers employed in it, and also authorized him to nominate a secretary and such other officers, as might be necessary to assist him in the functions of his office.

Mr. Elphinstone, on the 11th of February 1818, issued a proclamation at Sattara, in which, after setting forth various acts of aggression by the Peishwa against the British Government, he proceeded to state, "that by these acts of perfidy and violence Bajee Row has compelled the British Government to drive him from his musnud, and to conquer his dominions. For this purpose a force has gone in pursuit of Bajee Row, which will allow him no rest; another is employed in taking his forts; a third has arrived by the way of Ahmednughur, and a greater force than either is now entering by way of Candeish, under the personal command of his Excellency Sir Thomas Hislop; a force under General Munro is reducing the Carnatic; and a force from Bombay is taking the forts in the Concan, and occupying that country, so that in a short time no trace of Bajee Row will remain. The Raja of Sattara, who is now a prisoner in Bajee Row's hands, will be released, and placed at the head of an independent sovereignty of such an extent as may maintain the Raja and

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5 Dec. 1817,
Appointment
of Elphinstone
to be commis-
sioner for set-
tlement of
conquered
country.

11 Feb. 1818,
Elphinstone's
proclamation.

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his family in comfort and dignity. With this view the fort of Sattara has been taken, the Raja's flag has been set up in it, and his former ministry have been called into employment. Whatever country is assigned to the Raja will be administered by him, and he will be bound to establish a system of justice and order. The rest of the country will be held by the Honourable Company. The revenue will be collected for the Government, but all property real or personal will be secured. All Whuttan and Enam (hereditary property), Wurshausun (annual stipends), and all religious and charitable establishments, will be protected, and all religious sects will be tolerated, and their customs maintained, as far as it is just and reasonable. The farming system is abolished. Officers shall be forthwith appointed to collect a regular and moderate revenue on the part of the British Government, to administer justice, and to encourage the cultivators of the soil: they will be authorized to allow of remissions in consideration of the circumstances of the times. All persons are prohibited from paying revenue to Bajee Row or his adherents, or assisting them in any shape. No reduction will be made from the revenue in consequence of such payments. Wuttundars, and other holders of lands, are required to quit his standard, and repair to their villages within two months from this time. The Zemindars will report the names of those who remain, and all who fail to appear in that time shall forfeit their lands, and be pursued without remission until they are entirely crushed. All persons, whether belonging to the army or otherwise, who may attempt to lay waste the country, or to plunder

the roads, will be put to death wherever they are found."

Mr. Elphinstone, by a letter, dated the 6th of February 1818, appointed the other appellant, Captain Robertson, provisional collector and magistrate of the city of Poonah, and the adjacent country. He had been previously nominated by General Sir Lionel Smith to the command of the guards there, and he retained this command until September 1818, when he relinquished it to Major Fearon. Mr. Elphinstone's letter proceeded in these terms, "The extent of your district will hereafter nearly correspond with that of the Praunt of Poonah; but until the neighbouring districts shall have been settled I beg you not to confine your exertions to those limits, but endeavour to bring under your authority as much of the country as may be within your power. The first consideration therefore is to deprive the enemy of his resources, and in this and all other points every thing must be made subservient to the conduct of the war. All arrangements that interfere with that object must be reserved for times of greater tranquillity." The letter then proceeded to give instructions as to taking possession of the enemy's country; for rewarding the potails and villages which might declare in our favour; and for sending native agents and parties of *sebundies** to places where their presence might be useful, and to authorize Captain Robertson to entertain a thousand *sebundies*, or

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6 Feb. 1818.
Appointment
of Robertson
by Elphinstone
to be provi-
sional collec-
tor and magis-
trate of
Poonah.

Elphinstone's
instructions to
Robertson.

* Irregular native soldiers employed in the service of the revenue and police. See Glossary, by Wilkins, to Fifth Report of Committee of the House of Commons on the Affairs of the East India Company.

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more if he should find them necessary. "Some
 " organization," it was observed, "might be resorted
 " to, by which this species of soldiery might be im-
 " proved; but it was to be remembered, that it did
 " not suit our policy to preserve a military spirit
 " amongst them, but to allow them to sink into
 " judges and collectors peons. When a village has
 " once submitted, any practices in favour of the
 " enemy must be punished, as acts of rebellion, by
 " martial law. The commander in chief at Poonah
 " will be directed to assemble a court-martial, for
 " the trial of such persons as you may think fit to
 " bring before it, and to inflict capital punishment
 " immediately on conviction. The same course
 " must be adopted with regard to persons at
 " Poonah who shall conspire against our govern-
 " ment, and likewise with all banditti who may
 " assemble in the neighbourhood of the capital.
 " I particularly call your attention to the necessity
 " of inflicting prompt and severe punishment on
 " persons of this description. Prisoners taken from
 " the body of Bajee Row's troops, who may pass
 " through your district in the course of military
 " operation, must for the present be regarded as
 " regular troops; but parties sent to plunder the
 " country are in all cases to be considered as
 " freebooters, and either refused quarter, or put
 " to death after a summary inquiry, when there
 " is any doubt of their guilt. All other crimes
 " you will investigate according to the forms
 " of justice usual in the country, modified as
 " you may think expedient; and in all cases you
 " will endeavour to enforce the existing laws
 " and customs, unless where they are clearly

“ repugnant to reason and natural equity. The
 “ same rules apply to civil trials, in which I par-
 “ ticularly recommend the adoption of that system
 “ of arbitration already prevalent, subject to your
 “ confirmation. You will not fail to bear in mind
 “ the necessity of adhering to the customs of the
 “ country during the present provisional govern-
 “ ment. This may even be extended to the exemp-
 “ tion of Bramins from capital punishment, except
 “ when guilty of treason, or of joining banditti in
 “ plundering the country. All established religious
 “ institutions are to be maintained, and the expense
 “ to be allowed by Government. This is of course
 “ not to extend to Bajee Row’s establishment for
 “ performing magical ceremonies (anushtan), nor to
 “ his personal charities; but such of the former as
 “ are of ancient institution, like the annual anushtan
 “ for rain at Pashanee, and such of the latter as
 “ seem required by humanity, ought nevertheless to
 “ be kept up. You will exercise your own judgment
 “ on the subject. To enable you to protect the
 “ country from small parties of banditti and insur-
 “ gents, a detail of twelve companies of sepoy, and
 “ two hundred auxiliary horse, will be placed at your
 “ disposal as soon as the state of the garrison of
 “ Poonah will admit of. In case you should require
 “ further aid, you will apply to the commanding
 “ officer, who will be requested to afford it to the
 “ utmost extent of his means; but it must rest with
 “ him to judge of the practicability of the service
 “ required, and of the prudence of sparing the ne-
 “ cessary detachment from his force. If any consi-
 “ derable portion of the enemy’s army should ap-
 “ proach Poonah, all arrangement for the protection

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“ of the country must rest with the commanding officer, and you will no doubt think it advisable on such occasions to place your own parties at his disposal, retaining no more than are absolutely necessary for the purposes of police ; in like manner you will have the exclusive command of the guards in the town, but when threatened by an enemy you will see the necessity of placing them under the commanding officer, and allowing him to make all arrangements he may think necessary for the defence of the place. You will of course apprehend all sepoys or followers who may be found disturbing the peace of the city, or marauding in the neighbouring villages ; but you will send them to the commanding officer for punishment, furnishing him with all information you may possess in proof of their guilt.” The letter then proceeded to give full instructions as to the arrangements that were to be pursued in the collection of the revenue, the assurances that were to be given to the landed proprietors, of the protection of property, the line of conduct to be pursued to the Bheels and Rammoosees *, and to direct that the police of the country should be managed through the potails † supported, when necessary, by the sebundies and regular troops. It also contained a direction to make over Bajee Row’s property to the prize-agent ; “ but any part of it which the religious or other prejudices of the people required to be respected, is

* Native tribes living in the mountains, not under subjection to the Mahratta government, and generally carrying on a system of plundering warfare with the inhabitants of the plains.

† Chiefs of villages.

“ to be retained on account of the Public, the value
 “ being fixed in communication with the prize-
 “ agent.” Gokla’s and Trimbuckjee’s property
 “ is also to be considered as prize. I have the
 “ honour to enclose a copy and translation of
 “ a proclamation I have issued to the inhabitants
 “ of the Peishwa’s former dominions; I beg you
 “ to pay scrupulous attention to all the promises
 “ contained in it. I need not point out to you
 “ the great attention that must be paid to the pe-
 “ culiar prejudices of the inhabitants of Poonah.
 “ Beef is on no account to be killed in the town, or
 “ any where but in our own camps for the use of the
 “ European troops. No European soldiers are to
 “ be allowed to enter the city on any account; and
 “ the former prohibition against officers and gen-
 “ tlemen visiting it without permission, unless on
 “ duty, is to be strictly kept up. No European of
 “ any description is to be permitted to reside within
 “ the city.”

Under this letter of instructions Captain Robert-
 son continued in possession of the government of
 Poonah and the adjacent country until the time of
 the seizure of the treasure, on account of which the
 action was brought. After the defeat at Kirkee,
 the Peishwa kept his army moving about in different
 parts of his territory until the latter end of the month
 of May 1818, when he was finally driven out of it,
 and on the 3d of the following June he surrendered
 himself and his army in Candeish to Sir J. Malcolm.

Narroba left Poonah at the same time as the
 Peishwa; he did not however continue with that
 prince, but immediately went to the fortress of Rye-
 ghur, of which he was governor, and he remained

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May 1818,
 Peishwa is
 driven from
 his territory.
 3 June 1818,
 Peishwa sur-
 renders.
 9 May 1818,
 Narroba sur-
 renders Rye-
 ghur.

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and goes to
Poonah.

Evidence as to
character in
which Narro-
ba was con-
sidered at
Poonah on his
arrival.

there in that character until the 9th of May 1818, when the fortress surrendered, after a fortnight's siege, to Colonel Prother. By the articles of capitulation the inhabitants of the fortress were allowed to go to whatever place they might choose, and take away their own property; but not any other property. Narroba was however suspected by Colonel Prother of having fraudulently sent away large quantities of treasure, the property of the Peishwa, and the Colonel under that impression caused his baggage to be searched on going out of the fort. Four boxes, filled with gold coin and jewels, together with thirty-eight empty money-bags, were found in it, and were seized by the Colonel as public property, which Narroba had no right to carry away. The Colonel made a report to the Government of his conduct, and suspicions of Narroba, and in consequence of this report, orders were sent both to him and Captain Robertson to seize Narroba's person. Narroba went from Ryeghur to Poonah, and resided there until the time of the seizure in question in his own house, which had belonged to him previously to the commencement of hostilities. Considerable discussion took place however in the course of the argument before the Privy Council, as to the manner in which he went there, and the character in which he was considered by Government during his residence. According to the statement of his executor, Amerchund, (in a memorial which he presented to the Governor of Bombay before this action was brought, and which was read in evidence at the trial in the Court below), Colonel Prother seized his person, and after confining him for three or four days, sent him under a guard to Mr. Elphinstone at Poonah,

who released him, and allowed him to go to his own house, over which, however, a guard was placed, and he remained thus in a state of confinement and arrest until the time in question. The correctness of this statement was however questioned by the counsel for the respondents on the authority of a passage in a letter from Colonel Prother to Mr. Elphinstone, dated at the camp near Paulia, 17th of June 1818, which had been tendered in evidence at the trial on the part of the appellants, and had been rejected by the Court below: it had however been printed in the papers laid before the Council. The passage in question was, "As Mr. Secretary Warder has authorized me to secure the person of Narroba Outia, if found in the Company's territories, I suppose he is not gone as he intended to Poonah; if he has arrived, and resides there, of course it will be attended with no difficulty in securing his person, if such a measure may by you be thought necessary."

The seizure of the treasure for which this action was brought took place on the 17th of July 1818, when Captain Robertson, having been informed that a quantity of public treasure which had been carried out of Ryeghur by different persons of the garrison in fraud of the capitulation, had been brought to Narroba at Poonah, and was secreted by him there, caused his house to be searched by his assistant in the revenue and judicial department, Mr. Lumsden, and the commander of the sebundies, Captain Houston, accompanied by a party of troops acting under their orders. They found there fourteen bags of Venetians (Sequins), and fourteen bags of gold

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17 July 1818,
Seizure of
treasure by
Captain Ro-
bertson from
Narroba at
Poonah.

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Mohurs, which they seized, together with Narroba's account-books. Narroba was at the same time, together with his chief clerk, Dhondoo Bullol, committed to prison. They were both of them during their imprisonment repeatedly interrogated by Captain Robertson respecting this treasure, and Narroba was at length liberated on the 7th of November 1818, upon delivering up five more bags of Venetians, which Captain Robertson was induced to believe he had secreted of the public money in addition to the bags which had been seized. He also entered into security for his personal appearance, when required.

Evidence as to
 state of Poonah
 from May to
 December
 1818.

During the time of these transactions no actual hostilities were carried on in the immediate neighbourhood of Poonah. The head quarters of Major-General Sir Lionel Smith, whose command extended over Poonah and the country adjacent, were, from the time of the expulsion of the Peishwa from his dominions in May 1818 to December in that year, at Seroor, which is distant about forty-two miles from Poonah, according to his evidence which was taken in the Court below. " During that period he was " constantly backwards and forwards between Poo- " nah and Seroor, and was in the habit of receiving " reports as to the tranquil state of the country, or " otherwise, as brigadier of division. Wherever he " received information that the horsemen of the " enemy had means of re-assembling, he despatched " troops to preserve the tranquillity of the country, " and see that they did not re-assemble. He con- " sidered that he anticipated the tranquillity of the " country by sending the detachments, and if he " had not sent the detachments he considered they

“ would have been up again. They were not sub-
 “ dued, but dispersed ; he knew of 30,000 of the
 “ military class dispersed about the country ; he
 “ was in constant correspondence with the commis-
 “ sioner, both on military and political subjects, dur-
 “ ing 1818, and long afterwards. He corresponded
 “ with the commissioner on the disposal of our
 “ troops over the country. The commissioner con-
 “ sulted him in the first instance, and he gave him
 “ his opinion of the military arrangements. He
 “ considered it to be necessary that the force should
 “ be very strong to keep the tranquillity of the
 “ country. The peace-garrison of Poonah was only
 “ two battalions of native infantry ; but in 1818 it
 “ consisted of four battalions of native infantry, an
 “ European regiment, and a regiment of cavalry ; he
 “ should say 3,500 effective men. He considered
 “ it a necessary precaution to let every body see we
 “ had an overwhelming force, on account of there
 “ being a disaffected population, and the fact of one
 “ government having been overturned and another
 “ set up, and the character of the people being
 “ turbulent, and that these causes for keeping up
 “ a great force at Poonah continued during the
 “ whole of 1818, and for a later period. He kept
 “ his force at Seroor in a state of complete readiness
 “ for the field without any reduction of men, and
 “ did take the field in October in that year, when
 “ he went down southwards towards the Krishna.”

This evidence of the state of the country was cor-
 roborated by several other officers. During this period
 also no disturbance appeared to have taken place in
 the city of Poonah itself, and no attack was made
 upon it, although the guards there were stated to

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have been more upon the alert, and stronger than in peaceable times. A Court of Adawlut was also open there, and Captain Robertson presided as judge in it, both on civil and criminal trials. He performed his judicial duties in the same way as they had been performed under the Peishwa's government. Notwithstanding, however, the Peishwa's surrender of himself and his army to Sir J. Malcolm on the 3d of June 1818, some of his fortresses still held out against the English *, and hostilities were not terminated in the province of Candeish until the surrender of Amulnair in the December following.

Applications
 by Narroba to
 government,
 and institution
 of action.

Narroba after his release applied to the governor of Bombay for the restoration both of the treasure which had been taken from him by Colonel Prother at Ryeghur, and from his house at Poonah by Captain Robertson's orders, and also of the five bags of Venetians which he had subsequently given up to Captain Robertson. The Government referred his claim to Mr. Chaplin, who succeeded Mr. Elphinstone in the office of commissioner of the Deccan. Mr. Chaplin, after examining Narroba himself, and investigating his accounts, made a report to Government in the year 1821, the nature of which did not appear on the trial. The Government persisted however in refusing to restore the treasure. Narroba died in the following year, but the claim was renewed by his executor Amerchund Berdachund, who in the latter end of the year 1825 commenced the action of trover against the appellants and the East

* The principal of these were Malligaum, which surrendered on the 16th of June, Pritchitghur, which surrendered on the 25th of June, and Moolheir, which surrendered on the 3d of July 1818.

India Company, from the judgment in which this appeal was instituted.

The particulars of his claim were sent by his attorney to the attorney of the defendants, and were afterwards read at the trial; they consisted of four accounts, the first was of gold coin, jewels and shawls, the property of Narroba, seized by Colonel Prother at Rhyghur. The second, of gold Venetians and mohurs, the property of Narroba, seized by Captain Robertson at Poonah; the third, of gold mohurs and silver rupees, the private property of Bajee Row*, intrusted to Narroba, and seized at

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Particulars of
respondent's
claim.

* A distinction appears to have been drawn in the court at Bombay between the public and the private property of the Peishwa. The late decision in the Privy Council in the case of the *Advocate-General of Bombay v. Amerchund*, has however declared that distinction to have been unfounded. In that case the Advocate-General of Bombay filed an information against Amerchund, who was a banker at Poonah, to recover, on behalf of the Crown, a large sum of money which had been deposited with him by the Peishwa previously to the conquest of that city by the British troops. The Court below gave a verdict and judgment against the Crown. The Advocate-General appealed from that judgment, and the case was argued before the Privy Council on the 28th March 1829. The ground of defence taken by the Respondent's Counsel, Spankie, (Serjeant) and Bruce, independently of some technical objections to the information and general arguments on the evidence, was, that part of the money was the private property (Khasgheet) of the Peishwa, and not belonging to or used by him for public purposes, and that not having been seized by the Government during the war it could not be recovered after the termination of it. In support of these propositions they cited Puffendorf, book 8, c. 6, s. 22, 23, and the *Attorney-General v. Weeden and Shoales, Parker*, 267. The Solicitor-General and Serjeant Bosanquet for the Appellants, cited e contra contra Bynkershoeck, *Quæst. Ju. Pub. lib. 1, cap. 4*, "Ecquando res hostium mobiles et præsertim naves fiunt capientium," and c. 7, "Hostium actiones et

There is no distinction between the public and private property of an absolute monarch; money therefore in the hands of the banker of a prince whose territories have been conquered by the British, may be recovered on an information by the attorney-general from the banker.

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Ryeghur in violation of the terms of the capitulation ; and the fourth, of gold mohurs, the private property of Bajee Row, intrusted to Narroba, and seized by Captain Robertson at Poonah. They amounted altogether, including interest, which had been calculated upon the property from the time of the seizures, to 36,56,00,07 rupees, 70 q', but in the course of the proceedings the claim for the property seized at Ryeghur was given up.

The defendants pleaded the general issue, and obtained a rule *nisi*, on the ground of His Majesty's interest being concerned, and otherwise for want of jurisdiction, which was on argument discharged with costs ; and leave to appeal against the judgment on that occasion was refused to them as contrary to the practice of the Court *.

" *credita quæ apud nos inveniuntur an exorto bello recte publicentur.*" The Privy Council reversed the judgment of the Court at Bombay. In the course of the argument Lord Tenterden asked, " What is the distinction between the public and private property of an absolute sovereign ? You mean by public property, generally speaking, the property of the state, but in the property of an absolute sovereign, who may dispose of every thing at any time, and in any way he pleases, is there any distinction ?" and in delivering the judgment of their Lordships he also observed, " another point made, which applies itself only to a part of the information, is, that the property was not proved to have been the public property of the Peishwa. Upon that point I have already intimated my opinion, and I have the concurrence of the other Lords of the Council with me in it, that when you are speaking of the property of an absolute sovereign there is no pretence for drawing a distinction, the whole of it belongs to him as sovereign, and he may dispose of it for his public or private purposes in whatever manner he may think proper."

* By the charter of the Supreme Court at Bombay the right of appeal is given from any of its " judgments or determina-

They then moved the Court for leave to withdraw their plea of the general issue, and to plead it again

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" tions." The right of appeal is given in the same terms by the charter of the Supreme Court at Madras ; and the same terms had been used in the charter of the Recorder's Court of that settlement. Till lately the Courts in India appear to have held these terms, " judgments or determinations," to apply only to final judgments, and that consequently no appeal laid from interlocutory judgments. The correctness of this construction however appears to be dubious since the decision of the Privy Council in the case of the *East India Company v. Syed Alley Khan*.

In that case there were two decrees of the Supreme Court of Madras, in a suit in equity, the first dated the 22d of May 1820, declaring the rights of the parties, and directing the accounts to be taken by the Master, the second dated the 28th of July 1821, on further directions, confirming the Master's report. The East India Company, on the 26th of January 1822, presented a petition to the Supreme Court for leave to appeal against both these judgments ; and that Court granted them leave to do so on the 28th of the same month. The case came before the Privy Council on the 2d of February 1825, on a petition of the respondents to dismiss the appellants (East India Company's) petition of appeal to the King in Council, so far as it sought to affect or reverse the decree of the 22d of May 1820. Their Lordships granted the prayer of the petition. The grounds of their decision were thus stated by Lord Gifford :—" The charter which gives the liberty of " appealing from a decree of the Supreme Court has provided " that no appeal should be allowed by that Court, unless the " petition for that purpose should be preferred within six " months from the day of pronouncing the judgment or deter- " mination complained of. Now the first judgment complained " of was pronounced in May 1820, and therefore considerably " more than six months before the application was made to " appeal ; and it has been fairly admitted in argument ; and it " could not be denied that was a judgment that might have " been brought before us, although it directed a further account " to be taken as consequential to the decision of the Court as " to the right of the parties. If the East India Company chose

Where a Court below has granted leave to appeal in a case in which they were not authorized by their charter to do so, it is not sufficient for the appellant to present the common petition of appeal to the King in Council.

A special application for leave to appeal must be made to the King in Council under such circumstances.

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with other pleas, showing that the property, the conversion of which was stated in this action, was

“ to prosecute the appeal from the decree upon further directions, there can be no objection; but the question is, whether the Court below had any right upon that decree, upon further directions, to give them a right to appeal against the first decree, which decided the rights of the parties. This Board cannot say they had a right to do so. The complainants might have petitioned specially upon that point, but it must have been in the nature of a special application, stating special circumstances, and showing a strong case to the Board for permitting them to have that indulgence, and also accounting for their negligence in not having appealed in due time. The application which they have already made is only asking for leave to appeal as a matter of course against the first decree; and this Board are of opinion that such permission cannot be given to them, and therefore that the respondents petition must be granted, so as to restrict them to the appeal against the decree upon further directions.”

Where a party has lost his right of appealing, according to the charter of a Court below, through the erroneous construction of it by that Court, the Privy Council will, upon a special petition, grant them leave to appeal.

The East India Company then presented another petition, specially for leave to appeal against the decree of the 22d of May 1820, stating the practice of the Court below as to the refusal of appeals against interlocutory decrees, and accompanied by an affidavit of Sir Thomas Strange, the late Chief Justice of Madras, in which he confirmed the allegations of the petition, and stated, that during the time he held the office of Chief Justice, if any application had been made for leave to appeal against the order of the 22d of May, it would have been refused as premature. The petition was heard before their Lordships on the 4th of February 1826; and the counsel for the East India Company, Serjeants Bosanquet and Spankie, cited, in corroboration of their statement, the case of *Johnson v. The East India Company*, 1st Strange's notes, 18. The judgment of their Lordships was delivered by Lord Gifford, who after recapitulating the former proceedings, in this case, went on to say, “ they (the East India Company) have now presented “ a petition praying the indulgence of this Board, stating that an “ error had existed at the Supreme Court at Madras, ever since “ the granting of the charter in the year 1800 down to the “ present period; and they have procured the affidavit of the

taken and seized as lawful prize, and so by right of war and conquest. This motion was also refused, with costs. The Court then proceeded to try the

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“ respectable judge who formerly filled the highest judicial
“ situation in that court, who swears, ‘ that during the whole
“ time he so held and exercised the said office an established
“ practice existed (founded on a prevailing understanding of
“ the intention and construction of the said letters patent) of
“ granting leave to appeal to His Majesty in Council from
“ judgments or determinations of the said Court of Judicature
“ only on the ultimate conclusion of a suit, when the whole
“ suit, and every thing regarding it, save only execution, had
“ attained maturity, and when the party dissatisfied might have
“ the benefit of such right of appeal, to the extent of every
“ part of the proceeding on which error might be assignable.’
“ A case has also been stated before us, determined so long ago
“ as 1799, which was before the period of granting the present
“ charter; but the words of the charter then existing were
“ very similar to the present charter; and upon that occasion
“ the court below determined that it was not competent to
“ parties to appeal upon what was considered merely as an inter-
“ locutory judgment. Under these circumstances the question
“ is, whether this error, which has prevailed up to the time
“ when this appeal was presented, is such an error, as should
“ induce the Board to grant the Company the indulgence now
“ asked. It has been urged before us, that this case ought to
“ be determined as if it was a case pending between two humble
“ individuals. Not only ought it to be so determined, but this
“ court will look with jealousy upon a case, where such a
“ powerful body as the East India Company is concerned.
“ We think, however, that as in a case we decided this morn-
“ ing, where an error exists in the officers of a court, and the
“ court itself, it will be too much to shut out a party from their
“ right of appeal; and we, with great reluctance, grant the per-
“ mission to appeal in the present instance.” His Lordship
then proceeded to state, that from the laches of the East
India Company in not having previously presented their
petition, it would be impossible to grant them this indulgence,
except upon their paying the whole of the respondents costs
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action between the parties ; and the cause, from the great number of witnesses and exhibits produced on both sides, lasted twenty-two days. At the conclusion the Court dismissed the action as against the East India Company, and gave the judgment and verdict against the appellants, which was appealed against. In assessing the damages the Court declared they gave not only the value of the property at the time of the alleged conversion, but also compound interest at the rate of six per cent. on it to the time of the final judgment. The property in respect of which they intended to give the damages and interest appeared from the terms of the judgments delivered by the Chief Justice, Sir E. West, and the puisne Judge, Mr. Justice Chambers, to have been Narroba's private property, seized in his house, and the six bags of Venetians he afterwards gave up. Some difficulty, however, was found on ascertaining upon which of the items of the particulars of claim they were given, as the sum recovered upon the judgment much exceeded what it would have done, had the damages been assessed on that calculation. The principal question below was, whether the treasure seized was the private property of Narroba, or whether it was public property which had been intrusted to his care by the Peishwa, and had been conveyed by him to Ryeghur, and brought fraudulently from thence, in breach of the capitulation, to his house at Poonah. This question depended upon a train of very complicated and, in many points, contradictory circumstantial evidence ; and other questions arose, as to whether particular parts of this evidence had or not been improperly admitted or rejected by the Court below, and

whether interest ought to have been allowed in an action of this description *. All these questions were argued before the Privy Council; but their Lordships gave no decision upon them, and the arguments are not therefore reported.

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The Solicitor-General, (Sir *E. Sugden*,) and *Wightman*, for the appellants :—

The first question will be, whether the Court below had jurisdiction, speaking generally, with reference to its charter; secondly, if it had jurisdiction in that respect, whether it had jurisdiction in this case, with regard to the subject-matter; and thirdly, whether the circumstances under which Narroba was placed had not taken away his right to apply to that Court.

There is no evidence on any part of the record to show that Poonah has ever been annexed to the government of Bombay, and consequently no evidence that the Municipal Court there ever had jurisdiction over the matters in question. Although indeed we know as an historical fact, that Poonah has been annexed to that government, yet the annexation did not take place till a period much later than that of the transaction which gave rise to this action. It appears from the evidence, that at that time Poonah was in an unsettled state. The proclamation of Mr. Elphinstone stated that an independent sove-

* The Counsel for the Appellants relied on the general rule, that interest cannot be recovered in trover. The counsel for the Respondents cited, in support of the decision of the Court below the cases of *In re Badger*, 2 Barn. & Ald. 691; *Fisher v. Prince*, 3 Burr. 1364; *Mercer v. Jones*, 3 Camp. 477; and *Vencata Runga Pillay v. The East India Company*, 1st Strange's notes, 179.

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reignty should be provided for the Raja of Sattara ; and even supposing that this proclamation amounted to a convention between the British Government and the inhabitants of the conquered territories, (as it was improperly held to have been in the Court below,) it would not have been a breach of the terms offered by it, if Poonah had been placed under the dominion of the Raja, and never formed part of the British territories. The truth is, that the country at that time was in its passage to a settlement one way or other, but what that settlement was to be was undecided; and if this was its state, no action could be maintained in the Court at Bombay. Even, however, if the Court at Bombay could have had jurisdiction in common cases, it could not have had jurisdiction in a case of this description.

Nothing was said in the Proclamation of Mr. Elphinstone about the establishment of the King's Courts of Justice. There must be some sort of tribunals of justice in every conquered country to arrange the immediate disputes of the people ; but from the evidence in this case it appears that Poonah was under military dominion to a period much later than that in which these transactions took place. In fact, hostilities did not cease until the surrender of Amulnair in the latter end of the month of November. Up to that time positive engagements were taking place ; there was an actual state of warfare ; and no civil rule could be said to have existed to give any person the rights of a subject, or to relieve him from military dominion. The proclamation only contemplated a state of this kind. The Wuttundars and holders of land who remained with Bajee Row were there threatened to be pursued without inter-

mission, until they were entirely crushed. All persons who should attempt to lay waste the country or plunder the roads were told by it, that they would be put to death wherever they might be found. Did these expressions mean that those persons should be brought to trial in a Municipal Court, or that they should be punished by the power of the sword? It was impossible to say that there was any civil rule in the country beyond what must be necessary in all countries even in a state of warfare. During the whole time a military force was requisite to preserve order; and there can be no concurrent jurisdiction between the civil and military powers. Supposing that Poonah had actually been attacked, (and such an occurrence is contemplated in Captain Robertson's instructions); and suppose that the military force had found it necessary to resort to severe measures, and that many persons had lost their lives in consequence of them, if the ground taken by the Judges in the Court below can be maintained, it must necessarily follow that our own soldiers and adherents might have been brought to trial for their lives before these Judges as a Municipal Court for their conduct on such an occasion. No country can ever be thoroughly brought under subjection, if it is to be held, that, where there has been a conquest, and no capitulation, the mere publication of a proclamation desiring the people to be quiet, and telling them what means would be resorted to if they were not so, so far reduces the country under the civil rule, that the army loses its control, and the Municipal Courts acquire altogether jurisdiction, so that every action of the officers in the direction of military affairs is liable to their

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cognizance. This point was however taken for granted throughout the judgment of the Judges of the Court below. They assumed the proclamation to be a convention, that the peaceable inhabitants were taken under the protection of the conqueror, and became our subjects, and that consequently their power as a Municipal Court arose. Such a doctrine, if established, would tend to unnerve the arms of the soldier, and to render quite fruitless the conquest he had obtained.

In support of this position the Judges in the Court below principally relied on the cases of *Campbell v. Hall**, and *Fabrigas v. Mostyn*†, and on their authority they asserted that the country having been conquered by the British arms became a dominion of the King in the right of his Crown; and that the conquered inhabitants once received into the conqueror's protection became his subjects, and were universally to be regarded in that light, and not as enemies and aliens. Both of these cases are distinguishable from the present. In *Campbell v. Hall* an action was brought against the collector of customs at Grenada by a merchant resident there. Grenada had been surrendered to the British in 1762 by a formal capitulation, in which there were terms and articles on both sides, and in the treaty of peace in 1763 it was ceded to us by France. The act on account of which the action was instituted, was committed after the treaty, and when the island was as clearly therefore a part of His Majesty's empire as any of his foreign possessions could be. In *Fabrigas v. Mostyn* an action was

* State Trials, vol. 23, p. 322, and Cowper, 205.

† Cowper, 165.

brought for an act done in 1773, in the island of Minorca, which had been ceded to the Crown of Great Britain in 1713 by the treaty of Utrecht, and had been therefore sixty years under His Majesty's government, and during the whole of this time Courts of Justice had been regularly held. The state of things therefore both in Grenada and Minorca, at the time the causes of action in both these cases arose, was very different to that at Poonah at the time of the seizure of this treasure, when the only ground for saying that it was under the protection of the British Government was the proclamation, and there had been no capitulation, and no annexation of the country to our dominion by a treaty of peace.

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But assuming that the proclamation amounted to a convention between the British Government and the people of Poonah, Narroba cannot be held to be entitled to the benefit of it. There must be two parties to a convention; there must be terms tendered by the one and accepted by the other. Can Narroba be said to have accepted the terms of this proclamation, when at the time it was issued, he had left Poonah, and continued for more than two months afterwards in arms against us. The treasure in question at least cannot be protected by the proclamation, for it appears not to have been in Narroba's house at the time the proclamation was issued, and if it had been, it would have been liable to seizure as the property of an enemy.

But perhaps it may be contended, that although Narroba was not at the time of its publication entitled to the benefit of the proclamation, he afterwards became so by the capitulation of Ryeghur.

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The answer to such a proposition is, that he was proved to have broken the terms of that capitulation, and therefore he was not entitled to the benefit of it. At any rate, such was the decision of Colonel Prother, who sent him to Poonah a prisoner of war, and a Municipal Court has no power to dispute the judgment of a commanding officer on points of this description. The Colonel was responsible to Government for any misconduct, but not to a Court of Justice. Even if the Arab garrison had attempted to rescue their commander, and the Colonel had put them all to the sword, he would not have been amenable for such an action to the jurisdiction of the Supreme Court. Questions respecting the infraction or observance of treaties never have before been agitated before courts of law, any more than questions respecting booty acquired in a continental land war, as was observed by Lord Mansfield in *Lindo v. Rodney**. The construction of the articles of a capitulation, and the decision as to who are entitled to the benefit of it, and the manner in which it is to be carried into execution, belongs at the time to the conqueror. If he misconstrues or breaks the articles he commits a violation of the laws of nations, for which reparation must be given to the other side, or reprisals taken, but which can never be the ground of an action in a Municipal Court. Did such a jurisdiction exist, it would be found most inconvenient in practice; but the fact of its never having been exercised in any court of law furnishes a very strong presumption against its ever having existed. There are no direct decisions on this point in the books, because the ques-

* Douglas, 313.

tion never has arisen; but it lies on the other side to show why a jurisdiction which never has been claimed before should now, for the first time, be exercised.

But even if Narroba had been entitled to the benefit of the capitulation, the utmost, that the terms of it allowed him, was to go with his army and property wherever he chose. He might have gone and joined the Peishwa, who was then still in arms against us, or he might have put himself at the head of the thirty thousand of the military classes whom General Smith describes as dispersed about the country. There was nothing in the articles of capitulation to constitute him a British subject. It cannot be held that a man may at his own election make himself our subject, and entitle himself to all the privileges of that character, and that with the arms, which he had just used against us in his hands, he might take up his residence in any part of our country, he might think proper to choose. But even admitting this proposition, Narroba had no power of making such an election. He was sent to Poonah as a prisoner of war for a breach of the articles of capitulation, and remained there under military surveillance, and a guard was placed over him, until the time of the seizure of the property in question, so that he neither had nor could have then acquired the right of a British subject. He was an alien enemy, not entitled to the benefit of the proclamation, because he had not complied with its terms; not entitled to the benefit of the capitulation, because he had been adjudged to have broken them by the only authority, who was competent to judge of the question; and not entitled to claim the protection of the

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British government as an inhabitant of a conquered country, because he inhabited that country not as a free agent, but under the control of the military force. For these reasons, therefore, even if your Lordships are of opinion that the Court below had jurisdiction to try the cause, we submit that their judgment ought to be reversed.

J. Williams (K. C.), and *Denman* (K. C.), for the Respondents, and with them were *Stephen* (Serjeant), *Adams* (Dr.), and *Lewis*.

The charter by which the Supreme Court at Bombay was constituted gave to it in express words
 “ Jurisdiction over all such persons as had been
 “ theretofore described or distinguished by the ap-
 “ pellation of British subjects, and full power and
 “ authority to determine all suits and actions what-
 “ soever against any such subjects arising in terri-
 “ tories subject to or dependent upon, or which
 “ thereafter should be subject to, or dependent upon,
 “ the government of Bombay, or within any of the
 “ dominions of the native Princes of India in alli-
 “ ance with the said government, or against any
 “ person or persons who at the time when the cause
 “ of action should have arisen should have been
 “ employed by, or have been directly or indirectly
 “ in the service of, the East India Company.” Both
 Mr. Elphinstone and Captain Robertson were in
 the service of the East India Company, and the
 jurisdiction of the Court to try an action to which
 they were made defendants, so far as regards its
 charter, cannot be disputed.

It is said that the Supreme Court could have no jurisdiction in this particular case, or over any act done

in the Deccan in the year 1818, because the country was in a state of war; that martial law was the only law that prevailed during that period, and that no civil rule was established. To answer this, it is necessary to look at the nature of the war in the course of which that province was subdued. It was a war of conquest and annexation, and its sole and avowed object was to place the principality of the Peishwa under the dominion of the East India Company. The proclamation of Mr. Elphinstone early declared this to be the intention of our Government; and from the moment that proclamation was issued every part of the country, that was conquered, became at the time of its conquest part and parcel of the dominions of the Crown of England. On the 16th of November 1817 the Peishwa fled from his capital, and it was taken possession of by us, and has ever since remained in our possession, which is the best answer that can be given to the argument, that it might have been transferred to the Raja of Sattara. If indeed it is not to be held to have been annexed to our territories by its conquest, and by Mr. Elphinstone's proclamation, can it be held to have been annexed to them at all, for no additional act has ever been executed to transfer it to our dominions? The proclamation was most justly held by the Court below to have amounted to a convention. It was a convention between the British Government on the one side, and those inhabitants of the conquered territory on the other side who might think fit to come in and claim the protection it offered to their persons and property. If King William the 3d, at the time of the Revolution, after he had come over to England

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had refused to abide by the terms of the proclamation he had published in Holland, if he had said, there are two or three forts still holding out in the Highlands; there are forces still in arms against me; my proclamation is no agreement, it is all on one side; there is nothing in it that can oblige me to give a free government to England until the whole realm is subdued; what would have been thought of his argument or his integrity? We are not indeed left entirely to our imaginations to conjecture what opinion would have been formed of them at that time; for we well know, that when Bishop Burnet maintained in a pastoral letter, that he had gained the throne by right of conquest, and was not bound by his proclamation, the consequence was, that his letter was ordered by the House of Commons to be publicly consigned to the flames by a not very dignified personage. Such was the manner in which Parliament received such an argument in those days; and we consider that it is not entitled to any more respect in the present. In the ordinary transactions of common life, if a man proclaims in the newspapers, that he intends selling his estate upon particular conditions, and afterwards he attempts to evade the performance of these conditions, we know that the Court of Chancery will enforce them; because, as we are told in Sugden's Treatise on Vendors and Purchasers*, an advertisement in the newspapers is held to be a contract with all the world.

But then it is said, that the country was unsettled, or in a state of passage from one settlement

* Cap. 1, s. 4.

to another. Such a state is unknown in our laws. A country must either be in a state of war or a state of peace, although it is sometimes difficult to define the actual boundaries between them. The distinction between the day and the night is perfectly intelligible, but who can ascertain the exact point where the one ends and the other begins. At the time however of the seizure of the treasure in July, Poonah had remained in the undisputed possession of the English since the time of its occupation by General Smith in the preceding November; the Peishwa had surrendered in June; all regular war was completely at an end; the only warfare, that continued, was irregular and transitory, and nothing remained to be conquered but a few detached forts, all of which were at the distance of more than 120 miles from Poonah, and appear to have been held out by refractory Arab garrisons against the will of their commanders. It cannot therefore be disputed that in point of fact at least Poonah was perfectly subdued and tranquil, and consequently in a state of peace: and we are furnished by our text-writers with an easy criterion, to judge whether it was not so in point of law also. Lord Hale* records one of the resolutions of the Judges in the Earl of Lancaster's case to have been, that "whenever the King's courts are open it is time of peace in judgment of law;" and Lord Coke in his Commentary on Littleton says †, "*Tempus pacis est, quando Cancellaria, et alia curia regiae sunt aperta, quibus lex fiebat cui- cunque prout fieri consuevit;*" and he goes on; "and

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* Pless of the Crown, part 1st, c. 26, p. 344.

† Co. Litt. 249 b.

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“ therefore, when the courts of justice lie open, and
 “ the judges and ministers of the same may by law
 “ protect men from wrong and violence, and distri-
 “ bute justice to all, it is said to be time of peace. So
 “ when by invasion, insurrection, rebellion, or such
 “ like, the peaceable course of justice is disturbed
 “ and stopped, so as the courts of justice be as it
 “ were shut up, et silent leges inter arma, then it is
 “ said to be time of war.” So that where there is
 a doubt as to the actual position of affairs in a
 country, and it is shown that the King’s Courts are
 open, that country must be held in law to be in a state
 of peace. At Poonah the Courts had been open since
 February 1818; and therefore it must be held to
 have been in a state of peace at the time of the
 seizure of this treasure, especially as during the
 whole of the intermediate time no actual conflict had
 ever taken place in it. An opposite holding would
 indeed lead to this conclusion, that no action could
 have been brought in any Court, an argument which
 could not very well be maintained by the defendant,
 Captain Robertson, who himself presided at the
 Court of Adawlut during the period in question.
 Wherever the country is so far settled that protec-
 tion is afforded to life and to property, the man who
 acts illegally under colour of military authority is
 amenable to the laws, and must answer for his con-
 duct in a court of justice.

There was nothing in the character of either of the
 defendants to render them irresponsible. In *Fabrigas*
v. Mostyn, and *Campbell v. Hall*, governors were
 held liable for acts they had done without legal
 authority. A commissioner is at most only equal
 to a governor; perhaps his office is rather inferior;

at any rate he cannot pretend to a greater degree of irresponsibility. Captain Robertson, as an inferior officer to the commissioner, has still less claims to be exempted from the general rule. It does not signify for what period countries have been conquered and placed under the protection of the British throne; it is enough that they have been and remain so; and the distinction which has been attempted between the cases of Poonah, and those of Grenada and Minorca, from the greater lapse of time, that the latter colonies had been in our possession, cannot be supported.

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If however any objection is to be raised to the jurisdiction of the Court at Bombay in this instance, it cannot be done without giving another jurisdiction, to which the complaining party may apply. Upon this point, the first decision took place in the *Nabob of the Carnatic v. The East India Company**, and the question was completely set at rest by the case of *The King v. Johnstone*†, where, after a very considerable argument, it was decided, that to establish a plea to the jurisdiction of any Court it is necessary for you to show that some other, and what, Court, has jurisdiction over the matter in dispute.

But then it is said, that admitting the Court below to have had jurisdiction, and that the country was in a state of peace, Narroba was not entitled to claim the benefit of their jurisdiction, because he was an alien enemy, not entitled to the benefit of either the proclamation of Mr. Elphinstone, the capitulation with Colonel Prother, or the state of tranquillity the country was in. The defence of alien

* 1st Vesey, jun. 37.

† 6th East, 583.

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enemy applies only to the time of action brought; and a plea of this nature is bad, if it does not state the plaintiff to be so previous to and up to the filing of the suit. It can not be contended, that if Narroba had lived to the time of the institution of this action, that he would then have been an alien enemy; and if he would not have been so then, the question would arise, when he ceased to be one. If indeed it is necessary that a treaty of peace should be signed before the inhabitants of a conquered country cease to be considered as aliens, and become entitled to the protection of the conqueror, neither he nor any of the other inhabitants of Poonah would either then or now have been entitled to sue in the courts of Bombay. Captain Robertson might at this very time enter into the house of any Brahmin and seize all his property, and the injured man would be entitled to no redress, because no actual pacification has been concluded, and the country must still be held to be unsettled. Such a proposition cannot however be maintained; and after the proclamation of Mr. Elphinstone, and the subsequent reduction of the country to a state of tranquillity, every one of its inhabitants had a right to claim the protection of the British Government. Narroba was not excluded from the terms of the proclamation. Wuttundars, and holders of hereditary land who should continue in arms two months after its date alone were excepted from its benefit. No evidence is produced by the other side to show that he fell within the excepted class. Had he done so he would have become again entitled to those benefits by his capitulation with Colonel Prother. By that he was allowed to retire with his property to

whatever place he chose. No doubt the knowledge of the protection offered by the proclamation to the persons and property of those, who should come in and submit themselves, had considerable weight in influencing him to surrender the fortress, which appears to have been of great strength, and which Colonel Prother seems to have thought himself fortunate in gaining possession of before the commencement of the rainy season. His subsequent detention by the Colonel on a suspicion of having broken the articles of capitulation by secreting the public money, which we contend was unfounded, cannot make any difference in the case. The Colonel indeed, who was entitled to a share of the prize-money gained by the capture of the fortress, and who increased that money by the seizure of Narroba's property, was very unfit to act as a judge, whether the property belonged to the State, and was liable to seizure, or was private property, and protected by the capitulation. Captain Robertson subsequently was an equally improper judge on the same subject, for he was entitled to five per cent. on all the property seized; for, as Lord Stowell has observed, in the case of the *Two Friends**, "One of the great ends of the institution of civil society is to prevent men from being judges in cases wherein they are concerned, and to remit the decisions of adverse interests to those who can have no interest in the determination of any such cases." But it is said that Narroba was sent to Poonah as a prisoner of war. The only evidence of this is the statement of his executor Ameerchund's memorial, who of

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* 1st. Robinson, 282.

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course could only speak from the information of others. It appears however from Colonel Prother's own letter that he went voluntarily there, for the Colonel does not know whether he had gone or not, which could not be the case if he had sent him under a guard. Having thus gone there, he resided peaceably in his own house until the time of the seizure; and whether or not a peon was in consequence of the suspicions, that were entertained, set to watch, if any treasure was sent to him, is of very little importance. He was entitled to the protection of the British Government; and the conduct of the civil magistrate in imprisoning him, and seizing his property for a supposed breach of a military capitulation was unjustifiable.

The treasure in respect of which this judgment was given was Narroba's own. Supposing however that it belonged to the Peishwa; supposing the evidence to be true that has been adduced on the other side, that a large quantity of treasure had been conveyed out of the fortress previously to the capitulation, and since that time had been brought to Narroba's house at Poonah, still Narroba would have had a sufficient special property in that treasure to have maintained an action of trover against any wrong-doer who should take possession of it. "To give the conqueror a right of propriety, that will hold good against the conquered," says Puffendorf*, "there must of necessity be a pacification and agreement between both the parties, otherwise the right is supposed to continue in the old proprietor, and whenever he is strong enough he may justly struggle to recover it." Now here the

* Book 8, c. 6, s. 20.

propriety of the treasure had never been acquired by the British troops during the war. The Peishwa had surrendered to Sir J. Malcolm upon terms in the preceding month, although what those terms were does not appear in the evidence in this cause, and the propriety of the treasure remained in him, and Narroba, as his agent, had a right to maintain possession of it against the appellant. At any rate, as the mere possessor of it, he had a right to maintain his possession of it against all the world except the actual proprietor, as was held in the case of the chimney-sweeper who found a jewel; and neither of the appellants had any claim to that character. Admitting therefore the case on the opposite side to be true, though it is, as we contend, contrary to the weight of evidence, the judgment of the Court below must be sustained.

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The ATTORNEY-GENERAL, (Sir J. Scarlett,) in reply:—

When the success of a commander of an army enables him to take military occupation of a country, he may either deliver it up to the ravages of his soldiery, if he is cruelly disposed, or may place commissioners in it to preserve tranquillity, till final arrangements are made respecting it; and in the latter case it is very advisable to allow the usual courts of justice, that existed in the country before the invasion, to continue their jurisdiction upon such subjects as the commissioners may not think proper to reserve for the consideration of the commander; but this does not deprive that commander of his power, or free the country from military government. In the present case, when the

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Peishwa had been driven away from Poonah, although that city was taken possession of by the British forces, other places still remained under his dominion; and it was the object therefore of the British commander to cover by a military force the greatest extent of country he could, and to induce the inhabitants to submit to the British arms; for this purpose, Lord Hastings, who was the general-in-chief of the army, as well as vested with the supreme government of India, appointed Mr. Elphinstone a commissioner for the provisional administration of the country during the time that it was occupied by His Majesty's forces. The country was under a military occupation in every sense of the word during the continuance of Mr. Elphinstone's commission, notwithstanding the existence of the ancient tribunals of justice for certain purposes, and the Municipal Courts at Bombay ought not therefore to have entertained any suit of this kind. If it had been the policy of the British Government to have accepted the submission of Bajee Row, and to have replaced him on his throne, upon his making such sacrifices of treasure, or such a cession of dominion, as they might have thought fit to have exacted, could it have been contended, that what was done in the interval by the commissioner in the execution of the orders of Lord Hastings, or in the exercise of his discretion, would have been the subject of jurisdiction in the Civil Court at Bombay? Had Mr. Elphinstone in pursuance of instructions from the governor-general seized Gokla, or any other chief who was adhering to the Peishwa, can it be held that that chief could have brought an action against him for assault and imprisonment? And yet such con-

clusions appear inevitable from the premises on the other side.

Captain Robertson was appointed by Mr. Elphinstone to this provisional government of Poonah until the war was ended. His instructions told him that the first consideration was "To deprive the enemy of his resources, and in this and all other points every thing must for the time be made subservient to the conduct of the war." Now money forms the sinews of war; and Captain Robertson therefore, if he had reason to suspect that any person resident in Poonah was in possession of treasure, and meant to use or dispose of it for the benefit of the Peishwa, had distinct authority by this order to have adopted such measures as would have prevented the money having been thus made use of. According to the argument on the other side, however, he could not, with a view to that object, have seized any treasure without exposing himself to an action. I however beg leave to say, that even if he had been mistaken in his suspicions he would not have been liable to any action in any Court, either in India or in England. It is upon this letter of instructions that the other side rely, as showing that the country was in a state of peace, and that Captain Robertson was in the civil administration of it, and therefore responsible to the Court of Justice in Bombay. There are parts of it however which show that he was vested with a military authority: "When a village has once submitted, any practices in favour of the enemy must be punished as acts of rebellion, by martial law. The commanding officer at Poonah will be directed to assemble a court-martial for the trial of such persons as you

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“ may bring before it, and to inflict capital punishment immediately on conviction. The same course must be adopted with regard to persons in Poonah who shall conspire against our government, and likewise with all banditti who may assemble in the neighbourhood of the capital.” Can it be said, that peace was established in this place, when the person intrusted with the administration of it was authorized to assemble, at his discretion, a court-martial, and try persons by martial law? “ No European soldiers are to be permitted to enter the city on any account.” Now assuming Poonah to have been a part of the British territories in a state of peace, and in no respect subject to martial law, but governed either by the laws of the country, authorized by His Majesty, or the laws of Great Britain, so far as they applied, there is no doubt that Captain Robertson could not have prevented officers from entering the town, and would have been liable to an action of trespass for attempting to do so ; but such a supposition cannot be maintained. Your Lordships cannot doubt that Captain Robertson was a military officer, acting over military officers, and whether he acted rightly or wrongly must be determined by his own superiors, and cannot be determined in a civil court. Bajee Row’s property was by these instructions directed to be made over to the prize-agent, and yet it is for the very act of taking possession of his property that Captain Robertson is made defendant with the government of the country in a civil action. Gokla’s and Trim-buckjee’s property was also to be considered as prize, and yet, according to the argument on the other side, if Captain Robertson had taken their property

in a house at Poonah he was liable to an action in the Court of Bombay : Mr. Elphinstone who gave the order was liable, and the East India Company was also liable, because it was by their officers that the order was given. So that the government of a country, which employs a general to carry on a war, is to become liable afterwards in its own Court of Justice for taking the property of its enemies which had been confiscated, because they had refused to submit; and if His Majesty was unfortunately to engage in another war, and to obtain possession of an island belonging to the enemy by force of arms, and directions were sent from home that the laws of the country should be preserved and all property respected, with the exception of that of certain individuals, who had taken an active part in the hostilities, and to whom His Majesty did not think fit to extend the privilege of subjects, the authorities who executed that order would be liable to have an action brought against them in the Court of King's Bench for having obeyed it.

The proclamation of Mr. Elphinstone was a proclamation by a military commander, to induce the inhabitants of the country invaded to submit to his authority. No doubt the terms of that proclamation were kept, but the breach of them could never have been the subject of inquiry in a civil court, although it might have been the subject of a remonstrance by petition to the Government. Proclamations are always issued on such occasions. We have had an instance of one issued lately in the regency of Algiers. Can it however be said, that if any Moor or Bedouin had come in and submitted, and had afterwards been refused the protec-

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tion promised him under the terms of that proclamation, he could, after the conquest of the territory and the occupation of the town, have brought an action in the French courts against General Bourmont for a violation of the proclamation. It is clear that a general must be tried by another tribunal. The Government alone has the power to determine whether he has acted rightly or wrongly.

Narroba however could claim no benefit of the terms of Mr. Elphinstone's proclamation. Wuttundars and other holders of land are required by it to quit the standard of Bajee Row and return to their villages within two months from its date. It appears from Narroba's own will (which is in evidence in the cause), and by which he devises land, that he was a holder of land. It is equally clear that he adhered to the Peishwa; because, after the proclamation he was in command of the fort of Ryeghur, and opposed the besieging army. So that he is not only in terms excluded from claiming the benefit of this proclamation, but he was told by it that he would be pursued without remission until he should be crushed. Supposing even, that this proclamation had the force of a convention to those who submitted under it, by the same rule, and by the same spirit of interpretation, did it not except those, who did not submit and take the benefit of it? Was not Narroba, who was in arms after the proclamation, and did not submit within the time mentioned in it, as distinctly excepted in terms from claiming the benefit of it, as if he had been named in it. But if Captain Robertson and Mr. Elphinstone, acting under a suspicion that turned out to be unfounded, had entered Narroba's house and taken

every farthing of his property, under the terms by which Mr. Elphinstone held his government, and Captain Robertson his authority, no action could have been maintained by Narroba either against one or the other of them. It is unnecessary to refer to any decisions upon the law of England, or any modern jurists, to illustrate the position, that in a state resulting from a state of war, if property is seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authority, but no action can be maintained against the party, who has taken it in a court of law. If an English naval commander seizes property as enemies property, that turns out clearly to be British property, he forfeits his prize in the Court of Admiralty, and that Court awards the return of it to the party from whom it was taken; but the case of *Le Caux v. Eden**, decides the question that no British subject can maintain an action against the captor. The Court of Admiralty is the proper tribunal for the trial of questions of prize or no prize, and it exercises this jurisdiction as a Court of Prize, under a commission† from His Majesty; and if it makes an unsatisfactory determination the appeal lies to His Majesty in Council, for the King reserves the ultimate right to decide on such questions by his own authority, and does not commit their determination to any Municipal Court of justice. Now booty taken under the colour of military authority falls under the same rule. If property is taken by

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* Douglas, 573.

† For the form of one of these commissions, and generally on this subject, see *ex parte Lynch*, 1st Maddock, 18.

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an officer under the supposition that it is the property of a hostile state, or of individuals, which ought to be confiscated, no Municipal Court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by His Majesty, and by His Majesty ultimately, assisted by your Lordships as his Council. There are no direct decisions upon such questions, because, as was stated by Lord Mansfield in *Lindo v. Rodney**, they are cases of rare occurrence.

We have Colonel Prother's letter, who conducted the siege of the fortress of Ryeghur, written immediately after the capitulation, in which he states that Narroba had conveyed away property in fraud of the treaty, and that he suspects Narroba to have in his possession a great deal of public property. There are two orders given to Colonel Prother, and afterwards to Captain Robertson, by the Government, that Narroba is to be seized wherever he is found, as he has been guilty of a violation of the treaty. But even suppose that Colonel Prother had most clearly broken the terms of the capitulation, and had thought fit, upon some unfounded suspicion of his own, to seize and imprison Narroba. Could any English lawyer maintain that at the conclusion of the war Narroba could bring an action in consequence against the Colonel, if he could prove that he had not been guilty of anything that took him out of the treaty, and that by the laws of war he was entitled to the benefit of it? It is clear that a complaint to the Superior Government would have been the only means of obtaining redress for any

* Douglas, 592.

wrong he might have been guilty of. In what a situation would an officer be placed who signed a capitulation, for he must be the judge at the moment, whether individuals are entitled to the benefit of it, and it would be impossible to limit him in the exercise of his authority; and yet if he suspected that half the garrison were combining against him, and destroyed it for his own security, according to the argument on the other side he would be liable to be tried for murder.

It is clear, however, without resorting to the parol evidence given on the trial, that Narroba had concealed the property of the Peishwa. One of the accounts rendered by Bedreechund himself, as one of the particulars for which he instituted the action, is intitled, "The Honourable English East India Company, the honourable Mr. Elphinstone, and Captain H. D. Robertson, debtors to Amerchund Bedreechund, executor of Narroo Govind Outia, deceased, July 18th, 1818, to the following private property of Bajee Row, intrusted to Narroo Govind Outia, and seized by Captain H. D. Robertson at Poonah," and then the amount is given of gold mohurs and Venetians. Thus the very property it was the object of the military commander to confiscate and hand over to the prize-agent is admitted by the plaintiff who brings this action to have been in the possession of Narroba at Poonah. Was not Captain Robertson sufficiently justified by the terms of his appointment, the terms of the proclamation, and the whole tenor of the authority under which he and Mr. Elphinstone exercised their control in seizing this property? Is it not a matter of indifference whether or not any of Narroba's pro-

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perty was included in the seizure? Any man who adhered to the Peishwa after the publication of the proclamation was in terms excepted from all those advantages, that the conquering party was disposed to give to those, who submitted, but from which those, who adhered to the enemy were debarred; and can it be disputed that the concealing of his property is an adherence to the enemy? If Captain Robertson had acted only on a suspicion that turned out to be unfounded, acting under the authority he possessed, he would not have been answerable to the Municipal Court of Bombay, or to any other Municipal Court, but only to Government; but by the admission of the party himself it is evident that Narroba had concealed property of the Peishwa; by so doing he forfeited all rights to claim the benefit of the proclamation, the capitulation, or the instructions given by Mr. Elphinstone with regard to the property of those persons, who submitted to the Government, when our army took possession of the territory. This plaintiff therefore cannot stand entitled to the judgment he has obtained. The Court below had no jurisdiction in this case, and if they had a jurisdiction they ought to have decided contrary to what they have done, for the property seized was the property of Bajee Row; and even if some of Narroba's own personal property was mixed with it he had forfeited it by adhering to the enemy, and had no right to maintain an action in respect of it:

LORD TENTERDEN:—

We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*,

yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject; but that, if any thing was done amiss, recourse could only be had to the Government for redress. We shall therefore recommend it to His Majesty to reverse the judgment.

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ON APPEAL FROM LOWER CANADA.

JAMES ROGERSON, AND OTHERS *Appellants.*

And

ISAAC CORRIE REID - - - *Respondent.*July 10, 14,
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A mercantile house at Newry directs a house at Quebec to contract for the building of a ship, for which they, (the Newry House), would send out the rigging. The Quebec House enter into a contract with some ship-builders accordingly. The Newry House then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Quebec House, held, that the property in it was vested in the Newry House, and that the Quebec House had a right to retain it against the Liverpool cor-

respondent, on account of their lien on it for advances made to the builders, and payment of Custom-house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house.

THE respondent, on the 3d of July 1826, commenced an action of re-vindication* against the appellant for the recovery of some anchors and rigging; and on the same day the articles were seized by the sheriff under a writ of attachment (*entiercement*, or *saisie de re-vindication*), sued out by the respondent. The appellant appeared to the action, and put in a defence *à fonds en fait*, which is in the nature of our general issue. The facts which were proved by the evidence, and were undisputed by either party were as follows:

It is usual for British merchants to give orders for building of ships to merchants resident at Canada, as agents on commission; and in such cases the common course is for the Canadian merchant to contract with the actual builder to advance

* The form of declaration in re-vindication, as used in the courts of Lower Canada, closely resembles that of our own declaration in trover, except that it concludes with praying for the benefit of a writ of *entiercement*, or *saisie arrêt*. Under this writ the goods are liable to be seized by the sheriff, and kept in his custody by way of deposit until the trial. For the general nature and effects of this action see *Potier Traité de la Propriété*, partie 2^{de}

him the requisite monies, according to the terms of contracting for materials and work in the colony, and to draw from time to time for such advances on the British merchant, and for the British merchant to send out to the Canadian merchant the necessary rigging for the ship, and also a master to superintend the building of it, and navigate it to Europe.

Messrs. Henry & Reid, who were merchants resident at Newry in Ireland, by a letter dated the 23d of August 1825, directed the appellants, who were merchants resident at Quebec, "to contract for the building of a vessel of certain dimensions therein mentioned, to be called the Ocean, to be complete in cabin, and every other thing except the rigging; and they desired to be advised in good time of the appellants having made the contract, so as to be able to send out the rigging; and they agreed to allow the appellants two and a half per cent. commission for their trouble. Captain Maxwell was to have the command." The appellants contracted with some ship-builders at Quebec for the building a vessel according to this order, and on the 26th of April in the following year, when it was partly built, they took an assignment of it from the builders; they soon afterwards registered it in the names of a partner in a branch of their house established at Greenock. Captain Maxwell came to Quebec in the spring of the same year, with a letter to the appellants from Messrs. Henry & Reid. This letter directed the appellants "to supply him with any money he might require for outfits, and to obtain the certificate of register, so that they (Messrs. H. & R.) might register her on her arrival in Europe." Maxwell had in his way to Canada from Newry stop-

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ped at Liverpool, and had there taken the respondent, who was the Liverpool correspondent of Messrs. Henry & Reid, to Messrs. Brown, Logan, & Co. and ordered the rigging in question in this action. On his arrival Maxwell was employed in superintending the building of the ship. The rigging arrived in Quebec on the 21st of May, with an invoice made out in the name of the respondent, and a bill of lading, expressing that it had been shipped by the respondent, and was to be delivered to "captain Thomas Maxwell, ship Ocean, to be found at Messrs. Rogerson, Hunter, & Co." (the appellants.) It was deposited in the appellants warehouses, and they paid the Custom-house duties and other charges on it. In the June following they dismissed Maxwell from his situation as master of the ship, and an account was then made out between "The bark Ocean, and owners, and captain Thomas Maxwell," in which Maxwell's wages and expenses from the time of his leaving Ireland, were balanced against the sums which had been advanced to him by the respondent, as the agent of Messrs. Henry & Reid at Liverpool, and by the appellants since his arrival at Quebec; but no mention was made of the money which they had paid for the duties and other charges on the rigging. The amount of the balance was paid by the appellants to Maxwell. In May 1826 the house of Henry & Reid stopped payment, the appellants at that time being in advance on their account in respect of the building of the ship.

Thus far the facts of the case were undisputed; but some difficulty arose on account of the evidence of Maxwell. He deposed, that on the arrival of the

rigging he entered it at the Custom-house, and that it was landed under his direction ; that he then removed some of it to a place called Molson's Wharf, about three fourths of a mile distant, and went immediately about to procure store-room for the rest of it ; but that on his return he found that one of the partners of the appellants house had removed the articles he had left : That the same partner afterwards borrowed a bower-chain, which he (Maxwell) had removed himself, under the pretence of lending it to a vessel about to be launched ; but instead of that, he carried it away and put it into the appellants stores : That the respondent had desired those goods to be delivered to him (Maxwell), and had sent them out for the purpose of being employed upon a vessel, provided they were paid for : That he (Maxwell) was agent for the respondent ; whose letter of instructions to him (Maxwell) was, that he should hold the goods until he received security for the payment for him, and that he had given the appellants no permission whatever to take away the rigging, intending to keep it in obedience to the respondent's letter of instructions : That on his producing, at the request of one of the partners in the appellant's house, the invoice and bill of lading, the partner retained them, and refused to return them, though asked repeatedly for them : That when he ordered the goods, the respondent, as well as Brown, Logan, & Co., understood from him, that the goods were intended for the vessel then building for Henry & Reid, and that the goods in question were given by the house of Brown, Logan & Co. on the credit of the respondent, who was debited in their books for the amount. The appellants, in order to

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invalidate his evidence, proved, by the captain of the vessel who brought out the rigging, that Maxwell had given him to understand that it was intended for a ship building at Quebec; by that of one of their own clerks, that Maxwell had, without making any objection, delivered up to him the invoice and bill of lading on his application to him for them, by the orders of the appellants, three weeks or a month after the settlement of the account; and by that of a ship-builder of Quebec, that he had applied to Maxwell for an anchor which had been sent out for the Ocean, with a view of purchasing it; that Maxwell told him that he should be glad to exchange it for a lighter one, but that he could not take upon himself to do so, and directed him to apply to the managing partner of the appellant's house, who he said was in charge of the anchor, it having been sent out for a vessel built by them, and that he (Maxwell) had no authority to dispose of the same.

The Court of King's Bench, on the 20th of Feb. 1828, gave judgment in favour of the respondent, with costs, and that decision was confirmed by the judgment of the Court of Appeals in the Province, on the 30th of July in the same year, from which the present appeal was instituted.

Spankie (Serjt.), and *Stuart*, for the Appellants:—

The rigging, which is the subject of this action, was lawfully in possession of the appellants, as part of the outfit of the ship they were building for the house of Messrs. Henry & Reid at Newry. It had for that purpose been consigned by the respondent, who was the agent of the Newry House, and had been

delivered over by Maxwell to the appellants ; it was subject therefore to all the rights of lien, which had accrued to the appellants, both on account of their advances in respect of the ship, and of their payments of the duties and other charges on the rigging itself. Neither the appellants, nor Maxwell, were ever the agents of the respondent. Maxwell, indeed, after he had been dismissed from his situation as master by the appellants, had pretended that he had been invested with that character ; but his story was contradicted in many points, unsupported in any, and altogether improbable. He pretended to have had a letter of instructions, which ought to have been produced, if it existed, at the time of the trial, or if it did not exist, some evidence ought to have been given as to what had become of it : neither of these courses however was adopted ; nor was a tittle of evidence offered to confirm his assertion, that he had acted as the agent of the respondent, or even to prove, that he had ever pretended to have been so till the failure of Henry & Read first suggested to the respondent this plan of getting possession of the articles in dispute. The fact of the appellants having, as the agents of the Newry House, paid the Custom-house duties upon them, clearly proves that they were not considered to have been consigned to Maxwell as the respondent's agent ; and in the account which was made out upon his dismissal, although the appellants had then the rigging in their possession, he never attempted to charge them with it. Putting Maxwell's evidence out of the question therefore (as it must be), the respondent's case cannot be supported. The goods no doubt were delivered to Maxwell uncondition-

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ally, and the case stands on the same principles as that of *Ogle v. Atkinson**, where the decision was, that the unconditional delivery of goods to the captain was an unconditional delivery to the owner of the ship, and that the property therefore vested in him. According to these principles therefore the property would have vested in the Newry House, from whom Maxwell held his appointment as captain, and whose agent he undoubtedly was. Admitting, however, Maxwell's evidence to be true, he nowhere says, that he told the appellants, that he was the agent of the respondent, or that he had a letter of instructions from him; the same doctrine therefore applies; and the appellants having obtained unconditional possession of the goods, the property of them vested in the Newry House, subject to the appellants lien. The respondent had lost all right as an unpaid vendor to stop the goods *in transitu*, because by the delivery to the agents of the Newry House the *transitus* was determined, and according to the English law he had no title to institute such an action. By the French law however (which prevails in Lower Canada), an unpaid vendor may in most cases follow his goods in the hands of the purchaser, but this is one of the cases which Potier† mentions expressly as exceptions from the general rule, when he says, that the *possesseur de bonne foi*, if he loses possession of the articles, may bring his action of re-vindication to recover them against the proprietor himself. Uninformed as the appellants were by Maxwell of his character as agent for the respondent, they must be considered as *possesseurs*

* 1st Marshall, 323.

† Traité de la Propriété, partie 2nde, c. 1, art. 295.

de bonne foi. Even if they had lost the possession of the goods they might have recovered them, and *à fortiori*, not having parted with that possession, they were entitled to retain it.

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Pollock (K. C.), and *Pattison*, for the Respondents:—

The Courts below gave full credence to Maxwell's evidence, and founded their decision upon it; and your Lordships judgment in the late case of *Santacana v. Ardevol* * has established the principle, that it is the exclusive province of those Courts to decide whether evidence shall be believed, or not, and that their decision on that head shall not be questioned before you.—

[*Master of the Rolls*. That decision never was meant to establish the doctrine that this Court could not examine the evidence of the *res gestæ*.]

—Even if Maxwell's evidence was put out of the case the decision must be for the respondents; the property must have been delivered to them (if there was a delivery) under the impression, that it was to be employed upon a ship belonging to the House at Newry. Now at the time of that delivery there was no ship belonging to the Newry House on which it could be employed. The appellants, in consequence no doubt of some intelligence they had received of the approaching insolvency of the Newry House, had, by means of an assignment from the builder, and a registry in the name of some of the members of their firm, made the Ocean their own. It was a gross fraud therefore for them to receive these articles for the use of a ship belonging to the

* *Ante*, p. 269.

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Newry House, when they knew that at the time of their arrival, that there was no ship belonging to the Newry House in existence. It cannot even be argued, that they took out the registry of the ship in their own names, in pursuance of the directions from that house to take out a registry. The registry intended by that house was merely an interim-registry, or certificate, until the ship arrived in Europe, under the 41st Geo. 4, s. 10, not an absolute registry such as the appellants had taken. The invoices of the goods were made out in the respondents name, and this circumstance furnishes convincing evidence, independently of the testimony of Maxwell, that the property of them was his. Supposing this to be the case, he had full right, according to the English law, on hearing of the insolvency of the Newry House, to give orders to his agents to stop the goods *in transitu*, *Fiese v. Wray* *. The French law gave him further powers of preserving his property, for it allows the unpaid vendor to attach the goods in the hands of even a *bond fide* holder. The custom of Paris states the law in these terms: "Qui vend aucune chose mobiliere sans jour, et sans terme espérant être payé promptement, il peut sa chose poursuivre en quelque lieu qu'elle soit transportée, pour être payé du prix qu'il l'a vendue;" and Potier's commentary upon this article, in his *Treatise de la Propriété*, is, "Il résulte clairement de ces termes, 'il peut sa chose poursuivre,' lorsque le vendeur a vendu sans jour et sans terme, la chose vendue non obstant la tradition qu'il en a fait, en quelque lieu qu'elle ait été transportée, en quelques mains qu'elle ait passée, demeure toujours sa chose

* 3d East, 93.

“ jusqu'à ce qu'il ait été payé” *. Another principle of French law is, that the property of a thing does not pass by the mere delivery of it; it is also requisite, that he who delivers it should deliver it with the intention of passing the property; he who accepts it should accept it with the intention of taking the property. This is also stated by Potier in the same Treatise †, in these terms: “ Il faut que le consentement intervienne sur la personne, à qui l'on veut transférer la propriété de la chose dont on fait la tradition, si voulant me donner une chose vous la donnez à mon homme d'affaires, comptant la lui donner pour moi, et qu'il l'ait reçue croyant la recevoir pour lui, cette tradition ne transférera la propriété de la chose ni à mon homme d'affaires, à qui vous n'avez pas voulu la donner, ni à moi, mon homme d'affaires ne l'ayant pas reçue pour moi, Si procuratori meo rem tradideris, ut meum faceres, is hac mente acceperit, ut suam faceret nihil agetur.” Here the appellants received the articles with the intention of applying them to the use of their own ship; they were delivered to them for the purpose of being used in the building of the ship of Henry & Read. The property in them would not therefore pass to the appellants, because there was not that consentment or mutual understanding between the parties which the French law requires. In the passage that has been cited on the other side from Potier, where he says, that if the agent sells contrary to the orders of the owner, the purchaser may re-vindicate the property from the owner, it is evidently pre-supposed that the pur-

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* Potier Traité de la Propriété, partie première, c. 2d, art. 242.

† Ditto, partie première, c. 2d, art. 233.

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chaser shall have paid the purchase-money. Now here the appellants have never paid any thing. According to our own law, it is clear that goods which have been delivered by mistake can be recovered, *Litt v. Cowley**; and no person can obtain a lien by a wrongful act, *Griffiths v. Hyde*†. The action of re-vindication is indeed in principle like our action of trover, which has been termed an equitable action by Lord Mansfield, in *Pitxroy v. Gwillim*‡; and nothing can be more inequitable than that a man, should be allowed to retain goods, for which he has never paid, and which never would have come into his possession except either by fraud, or misrepresentation on his part, or misconception or mistake on the part of the agent from whom he obtained them.

Spankie (Serjeant), in reply :—

The appellants were clearly the agents of the Newry House, and the delivery of the goods was made to them in that character; even if it had not been so, the respondent had lost his property in them by the delivery to Maxwell, who was also the agent of the Newry House. The sections that have been cited from Potier do not bear upon the question; in the first quoted the delivery proceeded on a mistake; the parties were not agreed, and therefore there was no contract; the second quotation only says, that when no time for payment is stipulated the present time is understood; and thus when goods have been delivered on the understanding, that they are to be paid for by ready money, and no payment is made, the property of them remains in the vendor, and he may recover them. The reason for such a

* 7th Taunton, 169.

† Selwyn's Ni. Pri. MSS. 1388.

‡ 1st T. R. 153.

rule is plainly, because it is a fraud upon the vendor if the purchaser retains them without paying for them according to his agreement. Here, however, the goods had been delivered to the persons to whom they had been intended; and the reason why no contract was entered into with them for the payment was because the contract for that purpose had of course been entered into with the Newry House, and they were responsible for the payment. The case of *Trewhella v. Rowe** was very similar to the present. There the owner of a ship had ordered stores of the plaintiff; he then sold the ship to the defendant. The plaintiff delivered the stores on board the ship after its sale to the defendant, in pursuance of the orders he had received from its former owner previously to its sale, and afterwards sued the defendant for the payment. The Court of King's Bench unanimously held that the plaintiff had no claim against the defendant, because it was evident he must have furnished the goods on the credit of the former owner, and not of the defendant. Here it was clear that the respondent had furnished the goods to the ship on the credit of the Newry House, and on that account, in accordance with the principles established by the case of *Trewhella v. Rowe* the respondents had no claim against the appellants.

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MASTER of the ROLLS †:—

In this case their Lordships are of opinion, upon the balance of evidence, that there was an actual

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* 11th East, 438.

† The decision of this case was postponed on the first day's hearing, in order that their Lordships might obtain the assistance of Lord Tenderden, who was present at the second day's argument and the judgment.

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delivery to Messrs. Rogerson, Hunter, & Co., of Quebec, and consequently that the property did not belong to Mr. Isaac Corrie Reid. Their Lordships are not satisfied that Messrs. Rogerson, Hunter, & Co. had any fraudulent intention towards the Newry House in this transaction. The register taken out by them might have been a reasonable measure of security to prevent the ship being seized by the creditors of the Newry House, which it appears at that time they suspected of embarrassment in its circumstances. The Quebec House did not cause the register to be taken in the names of the partners resident at Quebec, but in the name of a partner who resides at Greenock. Greenock is in the immediate neighbourhood of Newry, and the register might therefore have been taken in that name, with the view of affording facilities for an equitable arrangement with the House at Newry. Their Lordships are further of opinion, that even if there was a question, whether or not there had been a delivery to the Quebec House, the delivery to captain Maxwell would have been a delivery to the Newry House, of which captain Maxwell was agent so as to vest it in the Newry House.

Two sections have been cited to us from the works of Potier as to the French law that prevails in Quebec. In the first of these sections it is said *, " If goods be delivered to my attorney for the purpose of being delivered to me, and he receives them not as for me, but as his own property, the goods do not in law pass to him." Now it is perfectly clear, from the Latin quotation, that the meaning of that section is, that if he by mistake receives them,

* Potier, *Traité de la Propriété*, part. première, c. 2, art. 233.

considering them to be delivered to him personally, and not to him as agent for me, it necessarily follows that a delivery by mistake passes no property. The Latin quotation is, “ Si procuratori meo rem tradi-
 “ deris, ut meam faceres, is hac mente acceperit, ut
 “ suam faceret, nihil agetur *.” If he receives it as his own, believing it is intended for him, when in truth it is not intended for him, but for me, who am his principal, then no property passes, it is a mere delivery by mistake. The other section of the French law, which has been cited, is this; “ Qui vend
 “ aucune chose mobilière sans jour, et sans terme,
 “ esperant être payé promptement, il peut sa chose
 “ poursuivre en quelque lieu qu’elle soit transportée
 “ pour être payé du prix qu’il l’a vendue †.” That is, that he, who has sold a thing without naming the day of payment, or fixing the time of payment, is to be understood as selling for ready money; and if a contract be made for ready money, and the purchaser possesses himself of goods under that contract, he does not obtain the property in those goods, till he has made the payment according to that contract.

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This has no application to this case. Upon the whole therefore their Lordships are of opinion that the judgment below must be reversed.

Judgment Reversed.

* Pand. 41, tit. 1, l. 37, s. 6.

† Potier Traité de la Propriété, partie première, c. 2, art. 242.

ON APPEAL FROM JERSEY.

JOHN BECQUET - - - *Appellant,*
 And
 PHILIP RAOUL LEMPRIERE, } *Respondents.*
 and FRANCIS GODFRAY - }

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1830.

The relationship which is formed by marriage is not dissolved by the death of one of the parties without issue, so that a husband, whose wife died childless, cannot afterwards act as a Judge in a cause to which her nephew is a party.

THE principal questions that were made in this case in the Court below related to the jurisdiction of the seneschal of the manor of Rozel, and a dispute between the lord and the appellant, who was one of the tenants of the manor, whether certain lands were the freehold of the tenant held in soccage of the manor, or whether the soil of them belonged to the lord, and the tenant had only a right of common over them. These questions were also argued before the Privy Council. Their Lordships however only decided upon a preliminary objection which had been made to one of the jurats in the Court below, and overruled there. This objection was that the jurat's first wife was aunt to the respondent Lemprière, and therefore that he was incapacitated, on account of his relationship, to decide as a judge upon a cause to which the respondent was a party. It appeared that she had died some time previously, without ever having had any issue, and the jurat had since her death married two other wives, by whom he had had children.

Campbell (K. C.), and *Selwyn* (K. C.), for the Appellant,

contended on this point that the Court was improperly composed. The jurat who was objected to

was incompetent to act in that character in a cause in which his own relation was a party. The ancient law of Normandy, which was the law of Jersey, clearly decided the question. The Grand Coutumier, in its 93d chapter on jurors, expressly laid down that "Cousins a l'une partie ni à l'autre ne doibuent pas estre receûx au serment;" and Rouillé, in his Commentary upon it, says that "Les parentez, et affins des parties, c'est assavoir, qui leur appartiennent de ligne, et qui ont espouseé aulcune de leur parentez, ou contre sont à ostre de la jurée." The rule was expressed in the broadest terms, and no authority could be produced for an exception from it in this case; it was analogous to that of our own law, which directs the sheriff in summoning a jury that they should be neither of kin to the aforesaid *A.* nor the aforesaid *B.*; and our books of practice point out no difference as to this exception, whether the relationship arises from marriage or not. Could the jurat have married a sister of his first wife? Could he have married a sister of the appellant? * There was no doubt that he could not have done either on account of his relationship, and for the same reason he was incompetent to act as a judge in a cause where his nephew was a party. This objection had been made to the same jurat in the case of *Froissard v. Duprée*†, in which he was excluded from the bench because he was a brother-in-law of one of the parties; and even a few days previously to the trial of this case he had asked and obtained permission to be excused from judging in a case between the same

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* See *Hill v. Good*, Vaughan, 322 & 323.

† Royal Court, December 4th, 1819.

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respondent * and Clement Richardson on account of his relationship. If he was incompetent to act as a judge, the sentence of the Court below was in fact for the appellant, the Court having been equally divided, and the decision having been determined by the casting vote of the bailiff †.

* *Richardson v. Lemprière*, Royal Court, November 27th 1828.

† The Court Royal of Jersey was constituted by a charter of King John. It consists of twelve jurats, who are judges both of law and fact; and a bailiff, who presides, collects the opinions of the jurats, and pronounces sentence, but who has no deliberative voice, unless the opinions of the jurats are equally divided, when (as in the present case), his vote decides the question. The bailiff, and three jurats at the least, must attend at what are called the ordinary, and the bailiff and two jurats at what are called the extraordinary Courts, *Jersey Code*, pp. 162 and 163. All sentences, however, for immovable property, and for moveable property of the value of sixty livres Tournois may be re-examined by the body of the Court, (*corps de cour*), which must be composed of seven jurats at the least, *Jersey Code*, p. 167. The Royal Court, although always composed of the same persons, bears, according to the nature of the subjects on which it decides, and the days on which it sits, the several names of Cour d'Heritage, Cour de Catel, Cour du Billet, and Cour du Samedi. See Falle's History of Jersey, c. 4, on Civil Jurisdiction; and the two "Statements of the Mode of proceeding and going to Trial in the Royal Court at Jersey, in "Cases civil, criminal, and mixed," which were prepared in obedience to an order of the Privy Council of the 21st of July 1789; one by James Hemery and James Dumaresq, esquires, who were deputies chosen by the states for that purpose; and the other by Thomas Pipon and Thomas Durell, esquires, the King's procureur and advocate. They have been both printed and published in a small quarto volume. Some alterations appear, however, to have been made in the practice of the Royal Court since the return of these reports. See *Le Quesne v. Nicolle*, ante, p. 257.

Brougham (K. C.), and *Alderson*, for the Respondent.

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At the time of the hearing of this Cause in the Court below the jurat was not related to the respondent either by blood or marriage. He never was related at all by blood, and his connection by marriage was dissolved upon the death of his wife without issue. In *Richardson v. Lemprière* the jurat's feelings of delicacy prompted him to request to be dispensed from giving judgment on a case where one of his own relations was a party; but there was an express decision of the Court that he was competent to act as a judge. Thus, in our own country, Mr. Justice Lawrence refused to try a cause in which one of his relations was concerned; but no one could argue from thence that he had not the power, as an English Judge, to have done so. In two other cases, however, in which the present respondent was a party, *Le Scelleur v. Lemprière**, and *Nicoll v. Mattingley*†, this same jurat acted as a judge; and the decision of the Royal Court in *Froissard v. Duprée* was reversed in appeal by this Board, and cannot therefore be acted on as an authority.

Campbell, in reply:—

Nothing conduces more to the advancement of justice, especially in small communities, than that the Judges should not be influenced by considerations of relationship. The connection of the jurat with the family of the respondent was indissoluble;

* Royal Court, October 10th, 1809.

† Royal Court, May 19th, 1819.

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when once formed it never could be broken. The general rule, that relationship was a disqualification, had been admitted indeed on the other side, and they had not been able to produce any grounds for an exception in this case. In *Le Scelleur v. Lemprière*, and *Nicolle v. Mattingley*, no objection appears to have been taken to the jurat's competency to act as a judge. Had it been taken, it would doubtless have been successful. Although the judgment of the Court of Jersey, in *Froissard v. Duprée**, was reversed by the Privy Council, their decision was founded on the general question, and not on the preliminary objection.

MASTER OF THE ROLLS:—

Their Lordships are of opinion that the decease of the aunt would not dissolve the bonds of affection which her husband might entertain towards her nephew. Suppose a case was to come on the day after the death of the aunt, would the affection which bound him the day before not exist the day after? It would be most difficult to draw such a distinction. The connections which are formed by marriage are not dissolved by the death of one of the parties, and therefore the judgment of the Court below must be reversed.

* No cases on this point appear in our own books. Both the ancient† and modern law‡ of France provide for an occurrence of this nature, by directing that if the wife dies without issue, neither the father, brother, or son-in-law, shall be judges. It would appear that her other relations might, in such an event, act in that capacity, although they could not have done so, if she had either lived, or left children.

† Ordonnance de l'Avril 1667, tit. 24, art. 4.

‡ Code de Procéd. Civile, tit. 21, art. 378, s. 2.

ON APPEAL FROM JERSEY.

Messrs. BERTRAM, ARMSTRONG, & Co. *Appellants.*

And

HUGH GODFRAY - - - *Respondent.*

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THE respondent, in the month of May 1824, purchased through the appellants house at Buenos Ayres the sum of 5,500 dollars, in the Buenos Ayres stock; on the 14th of September 1824 he wrote to them in these terms: "Gentlemen, I transmit you enclosed my power of attorney, authorizing you to receive the dividends on the funds bought in my name on the 8th of May last, as also to sell and transfer the same, should they be at 85 per cent. or above that price, and in that case you will remit me bills on London."

A commission to sell and transfer stock "when the funds should be at 85 per cent, or above that price," is a particular commission under which an agent is bound to sell when the funds reach 85; and has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price than 85.

The appellants replied to this by a letter dated Buenos Ayres, 20th September 1824, in which they acknowledged the receipt of the respondent's letter and power of attorney, and proceeded to state, "We regret to say, that on the arrival of the packet funds declined to 75%, from the very unfavourable looks of our stock in London; they are now at 70%. We do not despair nevertheless, as we

A mercantile house that had accepted such a commission, and had not sold when the funds reached 85, held there-

fore in Equity, to have made the stock their own from that time, and ordered to account to their employer for the price of it, with interest; he, in return, accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price—

Although the general rule in the Privy Council is not to condemn the appellant to pay the respondent's costs, where the Judgment of the Court below is altered on appeal, yet where the appellant might have obtained the alteration in the Court below without appeal, which was made on appeal, and the general principle of the Judgment was affirmed, he was ordered to pay the respondent's costs.

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“ expect that on the news of the prosperous state of
“ this country, and the expulsion of the Spaniards
“ from South America, they will take favour at
“ home. Should they again revive to your limits
“ will keep your order in view. In the mean time
“ we remain, &c.”

On the 7th and 8th of April 1825 the Buenos Ayres stock rose to 85, it remained at that price for those two days only, and immediately afterwards fell. The appellants House purchased during this time the sums of 6,100 dollars, 1,560 dollars, and 2,000 dollars, for three of their other correspondents, but they did not sell the respondent's stock; and he continued to receive his dividends on it, the last dividend he received being that due on the 4th of December 1826. The respondent learned the fact of the rise in the price by being shown accidentally some letters from the appellants to their other correspondents in Jersey, mentioning the circumstance; one of these letters went on to say, “ and we expect “ to see them much higher.” There was some slight difference in the evidence as to the time that elapsed after this information had been first given before the action was brought.

The appellant commenced an action against the respondents on the 18th of May 1827, and the Royal Court on the 2d of June 1829 condemned “ the appellants to account to him for the sum of 5,500 dollars of stock, at the rate of 85 per cent., and according to the rate of exchange at the time when the funds rose to that price, with interest thereon since that period, he accounting to them for the dividends he had received subsequently, and for that purpose that the Greffier should be appointed arbitrator.” The

Greffier then proceeded to take the accounts, and the appellants took objections to his report, which, when the case came again before the Court, were conceded by the respondent, and the Court on the 4th of July 1829 confirmed the report as amended, and condemned the appellants to the payment of the sum of 905 *l.* 11 *s.* 9*d.* The appellants now brought their appeal against both the judgments of the 2d of June and the 4th of July 1829.

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Pollock (K. C.) and *Pennington*, for the Appellants.

Campbell (K. C.), and *Schwyn* (K. C.), for the Respondents.

MASTER OF THE ROLLS:—

Their Lordships are of opinion that the judgment of the Court below ought to be affirmed with costs, for the following reasons: When an agent acts under a general authority he is bound to act for his principal as he would act for himself; when he acts under a particular authority, and for a special purpose, he has no discretion. If he thinks fit to accept such a commission, he must perform that commission according to his duty.

The first question therefore here is, whether a general authority, or a particular commission, was given to these appellants, and this depends on the construction of the two letters which have been referred to in the argument. The first letter from the respondent is in these words: "I transmit you
" enclosed my power of attorney, authorizing you to
" receive the dividends in the funds bought in my

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" name on the 8th of May last, as also to sell and
" transfer the same should they be at 85 per cent,
" or above that price." Now it has been argued
that because the words " above that price " are
added to the commission, a discretion was thereby
given to the agent ; their Lordships however are of
opinion that those expressions imply only this, " if
" they reach 85 or more you are to sell," and con-
sequently that there was a particular commission given
by this letter to the appellants. The next consid-
eration is, whether the appellants accepted the com-
mission, and for that purpose we must look at their
answer to the respondent's letter. In that answer,
after stating the present low price of stock, the ap-
pellants proceed to say ; " should they again revive
" to your limits we will keep your order in view."
This must necessarily be considered as a direct
acceptance by the appellants of that commission
which the letter from the respondent tendered to
them.

If the respondent, being aware that the stocks
had risen to 85, had afterwards thought fit to accept
the dividends, he could have founded no action
against the defendants for not complying with the
orders he had given them ; it must have been con-
sidered that he was willing to retain the stock, and
to take the chance of a future rise in its price. It
is therefore a material consideration, whether, upon
the evidence before the Court, it appears, that any
dividends were received after the intelligence of
the rise in the price. Now this being a part of the
defence to the action, it lay upon the appellants to
establish that fact, and the respondent was not
bound to enter into any evidence to establish the

contrary. In the absence of all evidence, the allegation that he did not know of the rise in the price when he received the last dividend would have been conclusive as against the appellants.

The respondent here has done more than the nature of the case required from him, for he has himself given evidence that he was not aware of that fact at the time he received the last dividend. He has called two witnesses, Mr. Francis Godfray, and a gentleman of the name of Le Gallais; and the stock having risen to 85 in the month of April 1825, and the last dividend the respondent received having been that due in December 1826, it appears from the evidence of these gentlemen, the one using the expression "some time before the action was brought," the other "a short time before the action brought," that a letter which had been addressed to them by the appellants was produced to the respondent, from the contents of which he received notice of the fact of the stocks having risen to that price; and these witnesses go on to state, and especially Mr. Francis Godfray, that upon the perusal of this letter he expressed great surprise at this fact, and that his orders, with respect to a sale when they should reach that price had not been obeyed. There is therefore here evidence upon his part, that he was not aware, until a short time before the action brought, of the fact of the rise of the stock.

It has been stated, that although it may be true that the stock was purchased at the price of 85 per cent., it does not necessarily follow that it could be sold at that price; and that with all the disposition, therefore, to execute their commission accord-

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ing to their instructions, the appellants might not have been able to sell stock at 85, though they might purchase it at 85. That is certainly a very singular argument to use, because it appears upon the evidence that they actually bought at 85 a much larger sum than the stock in question, and necessarily therefore they might have sold that very stock for their client. It cannot be stated therefore that they had not an opportunity to sell it at the price of 85.

It appears to have been taken for granted below, that the stock would necessarily become the property of the appellants, in consequence of the judgment they have given. Certainly, in point of equity, it would become so; but (as has already been stated by one of the Court in the course of the argument), it is, in the opinion of their Lordships, necessary for that purpose that a declaration to that effect should be introduced into the decree. Another consideration then is, whether, inasmuch as there will be an addition therefore to the decree, the appellants should or not escape the payment of the costs of this appeal, which would and ought in justice to fall upon them. Now it appears, upon looking at the statement in both cases, that after it had been referred to the officer of the Court to ascertain the amount of the sum which upon the principles of the decree was to be paid by the appellants to the respondent, and which amounted to 937*l.*, the appellants carried in a statement before that officer, by which they reduced the amount of the sum to be paid by them to 905*l.*, claiming however the benefit of an appeal as against the principle upon which the Court had decreed, but making no claim for any de-

duction in respect of the value of the stock, provided the principle of the Court below should be adopted in the Court of appeal. The defendant had an opportunity therefore to make that objection, and it appears from the common understanding of both parties upon the subject, that, if the objection had been then made, it would have been immediately cured by a declaration on the part of the Court. The appellants having had therefore an opportunity to acquire, without appeal, that declaration which is now given to them upon appeal, it appears to their Lordships, that they ought not for that reason to be exonerated from those costs which would otherwise have been given. The appeal will therefore be dismissed with costs, those costs to be settled in the usual manner by the Master.

The report of the Lords Committee, which was confirmed by His Majesty, was, "That the judgment of the Royal Court of the Island of Jersey of the 1st July 1829, should be affirmed, with 164*l.* 7*s.* 7*d.* sterling, costs; and that in addition to the said judgment, it should be declared, that the appellants are entitled to the stock in question on the said suit as their own property; and also, that it should be ordered, that if the power of attorney given by the respondent to the appellants, authorizing them to sell the said stock, has lost its effect by loss of time, the respondent do execute a new power of attorney, to enable the appellants to deal with the said stock for their own benefit."

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ON APPEAL FROM BARBADOES.

SAMUEL HENRY - - - Appellant.

And

JOHN HALL BYAR and ELIZABETH } Respondents.
his Wife - - - }13th Jan.
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Costs under the circumstances of the case allowed to the Appellant, and he being a mortgagee of property in the West Indies, directed to be raised, together with the mortgage money, by a sale of the mortgaged property, in case of non-payment by the Respondents.

THE appellant filed a bill in the Court of Chancery at Barbadoes for the foreclosure and sale of twenty-two slaves, which had been mortgaged to him by the respondents. They put in their answer, and alleged that although the mortgage was for 400*l.* yet that 300*l.* only had been in fact advanced, 100*l.* having been detained by the appellant as a premium, and they insisted therefore that the transaction was usurious, and that the bill ought to be dismissed. They did not however examine any witnesses, or bring forward any evidence to support these allegations. The Court below, on the 10th of May 1830, pronounced a decree, dismissing the bill. From that the present appeal was instituted. The respondents did not appear, and the case was heard *ex parte*.

Burge, and *Walcott*, for the Appellants,

contended that the decree ought to be reversed because there was no evidence produced to substantiate the charge of usury; and that as it was the case of a mortgagee the costs of this appeal ought to be taxed by a Master in Chancery here, and added to the mortgage-debt.

The MASTER of the ROLLS

Intimated the assent of their Lordships.

The costs were accordingly taxed by a Master at
137*l.* 7*s.*

The following order, in pursuance of their Lordship's report, was made on the 31st January 1831:

“ That the decree of the Court below should be reversed, with 137*l.* 7*s.* costs; and that in lieu of the said decree directions should be given to a Master of the said Court to take an account of what is due to the appellant for principal and interest on his mortgage, and to tax his costs of suit in the said island; and that upon the respondents paying to the appellant what shall be found due to him for principal, interest and costs of suit in the said island, together with 137*l.* 7*s.* costs of this appeal, at such time and place as the said Court shall appoint, the appellant shall be directed to execute a proper re-conveyance of the said mortgaged slaves, and to deliver up all deeds and writings in his custody or power relating thereto; but that in default of the said respondents paying to the appellant the principal, interest and costs aforesaid, as appointed by the said Court, the said slaves, or a sufficient number thereof, should be directed to be sold, agreeably to the rules and practice of the said Court, for the purpose of satisfying such principal, interest and costs.”

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ON APPEAL FROM JERSEY.

His Majesty's ATTORNEY-GENERAL
and the RECEIVERS of His Majesty's
Revenues in the Island of Jersey } *Appellants.*

And

13 & 14 Dec. 1830. W. M. SYMONDS, Esq. and ELIZABETH } *Respondents.*
MARY his Wife - - - - - }

The Crown is not entitled to primer seisin, or l'Année de Succession, upon the death of the lord of a manor in Jersey, held by tenure d'Haubert.

The existence of a feudal custom in one country, as England, affords no legal inference of its existence in another country, as Jersey.

THE question in this case was whether the Crown was entitled, upon the death of Sir Philip Carteret Silvester without heirs of his body, to the année de succession, or year and a day's possession of the rents and profits of the lordship or fief of Trinity, of which he was lord or seigneur. The appellants instituted proceedings on behalf of the Crown in the Royal Court of Jersey, for the purpose of obtaining possession of the manor. Upon presenting their remonstrance, they obtained, as a matter of course, a provisional order; by which, "for preserving right to whom it might belong, they were allowed to take possession as well of the manor of Trinity, as also of such hereditaments which Sir Philip might have possessed upon fiefs belonging to His Majesty, as well upon the said fief of Trinity, in order that they might enjoy the same par voie de garde jusqu'à ce qu'il se presente partie capable pour les reclaimer." The respondents, Mr. Symonds and his wife, who was the sister and next collateral heir of Sir Philip, opposed this claim on behalf of the Crown, and the Royal Court decided against it on the 18th of June 1829. From that decision the present appeal was instituted.

In the course of the proceedings in the Court below it appeared that the fief or lordship of Trinity was one of five lordships in the island, viz.; St. Ouens, Rozel, Melêches, Saumarez, and Trinity, which were held of the king as fiefs d'haubert, and were lordships paramount, of which other fiefs were held. The peculiar tenure of the manor of Trinity was proved by an ancient decree of partition between members of the family of Carteret, of the date of 1417, found amongst the records of the court; in which it was stated to be held, "franchement, et en chef du roi par payer deux maillards de riviere, quand il viendrait personnellement en la dite isle sans riens plus en pouvoir challenger, ni de mander par quelconque voie que ce soit sauf la féaute." And on the arrival of Charles the 2d in the island in 1651, Amice de Carteret, the then lord of the manor, presented to him a couple of mallards, of the receipt of which an acknowledgment was given by the King's command. An entry was also produced from the book or rental of the rents and revenues of his Majesty in the island, called "L'Extente," which was drawn up on the 30th of July 1668, in pursuance of an order of council of the 22d of March 1660. In this it was stated, "that Charles de Carteret possesses the frank fief and seigniori of Trinity, which is held by fealty and homage, by knights service, wardship; and when his Majesty comes into this island he shall present him with two ducks; owes suit of court at the pleas of heritage, and pays a relief when the case happens, 60 sous."

It was contended in the Court below, on the part of the appellants, that the Crown had a right to hold

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the five fiefs or manors paramount on the death of their lords without issue, for a year and a day, analogous to that which the lords themselves had of holding the lands of their sub-tenants who died without issue, or who renounced their lands for the benefit of their creditors*. And they produced a case from the Court Rolls of the 21st of January 1668, in which it had been decided that Peter La Roque, the lord of the manor of Sauvale, having died without lawful heirs of his body, the king should enjoy the same for a year and a day, notwithstanding the opposition of the principal heir of Peter La Roque, who contended that as the manor owed relief he ought not to be subject to such a demand.

The respondents contended that the payment of the relief of sixty sous, mentioned in the "Extente," was all that could be demanded upon the descent of the manor to collateral heirs; that in cases where the lords were entitled to hold the lands of their tenants

* When a person becomes insolvent in Jersey he is obliged to renounce his estate for the benefit of his creditors. The superior lord of whom his lands are held is then entitled to a year and a day's possession of them. In the mean time the creditors proceed to prove their claims before the Greffier of the Cour Royale, and they are then called upon according to the dates of their several encumbrances, beginning with the most recent, to accept or reject the debtor's estate; whoever rejects it loses his debts; whoever accepts it is entitled to the possession of the landed property from the expiration of the year and a day; but he must satisfy all the insolvent's debts that are prior to his own, and the costs of the proceedings. See Statement of mode of proceeding in Jersey, by Hemery and Dumaresq. fo. 28. An extract was read to the Privy Council from the court-rolls of the manor of Melêches, dated the 29th of June 1764, by which it appeared that the manor was then in the hands of the king, "par la renonciation de Philippe Bandinel, ci devant seigneur du dit fief."

for the année de succession no relief was due; and that where relief was due, no claim could be made for the année de succession; that the manor of Trinity had in the year 1780 devolved upon collateral heirs, and no claim for the année de succession, on behalf of the Crown, had been at that time advanced. And in reply to the decision in the case of the manor of Sauvale, they cited another decision of the Royal Court of the 19th of April 1716, in the case of the *King's Attorney General v. Amice La Cloche*, where the Attorney General had upon the death of George La Cloche seized of the manors of Longueville and Buisson, and of several other lands situate on the king's fiefs in the islands, without heirs of his body, claimed the année de succession upon all his property, and the Court had rejected the claim as to the manors of Longueville and Buisson, and granted it only as to the lands situate upon the king's fiefs. From this decision both the Attorney General and the heirs of La Cloche obtained leave to appeal, but the appeal did not appear to have been prosecuted.

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Campbell (K. C.), and *Pennington*, for the Appellants,

cited 2 Instit. 134, 135, on Stat. Marlebridge, cap. 17, and Blackstone, Comm. vol. 2, p. 63, to prove that primer seisin was a feudal burthen different from and additional to relief, which, notwithstanding the arguments of Spelman* to the contrary, existed in England previously to the Norman Conquest, under the name of Heriot, according to the opinions of our best antiquaries in former, and of

* Glossary, verbo "Relief." On Feuds, c. 17 & 18.

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the five fiefs or manors parcell'd Hallam* and their lords without issue, for many times. Primer gous to that which the lords of the country by the Normans held the lands of their subjects to tenure by knights or who renounced the tenure as the tenure d'haubert, creditors*. And primogeniture was held. The only Rolls of the 21st Edward I. primer seisin and l'année de succéder decided that in our country the right, instead of *Sauvaige* as in Jersey, by the actual hold-body, the lands for the year, was commuted for the a debt of a year's value of them; and there could be no doubt that it was a burthen well known to the introducers of it in their own country, of which Jersey formed a part. There were very evident reasons for the institution of this right of the lords, in the unsettled state of the law as to collateral successions in earlier times, of which we had an instance in the disputes for the throne upon the death of Richard Cœur de Lion, between King John, his youngest brother, and Prince Arthur, the son of his next brother. It then operated as a protection to the property of their tenants; for had there not existed some person with a legal right to take possession of the property while the right of succession to it was in dispute, a stranger might have stepped in, and by a year and a day's peaceable possession deprived the family of all claim to it, since this was the time of absolute prescription as to landed property amongst the barbarous nations of the middle ages, as appeared by the Salic law, and that of the Burgundians†.

* Hist. Middle Ages, c. 8, pt. 1st, vol. 2nd, pp. 408 & 415.

† History of England, page 115.

‡ See Houard Aunciennes Loix des Francais. Comm. on Litt. sec. 424, p. 489.

gnized as an existing right by the laws which contain express directions as to the the King and the lords of the lands of their tenants who have their body ; and the case of *La* instance both of the recognition, of it. The reason of the decision of below in the latter case of *La Cloche* was the Attorney General had claimed more than he was entitled to in demanding possession of lands not on the King's fiefs ; and the decision in that case having been appealed against by both parties must be considered as of very little authority.

Lushington (Dr.), and *Boteler*, for the Respondents :—

Where a burthen is endeavoured to be affixed on a subject it is the duty of the officers of the Crown to prove its existence, either by the statutes of the land, the *dicta* of institutional writers, cases decided in courts of law respecting it, or a long-continued practice in enforcing it. With regard to the claim in this case not a word is to be found in the Jersey code respecting it. Regulations indeed are contained in it concerning the manner in which the King and the other lords of manors shall hold the lands of their tenants who may die without lineal heirs ; but those regulations apply to the tenants of the King's own manors, of which there are many in the island, and on these the King has of course the same right to the *année de succession* as any other lord would have. The Grand Coutumier of Normandy, and the

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* Jersey Code, pp. 223 and 224.

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commentators on it, are perfectly silent upon such a right as is now asserted. Of the two decisions of the Cour Royale that have been quoted, the latter must be held to have overruled the former, which indeed relates to a manor held by a different tenure from that of Trinity, and could not therefore serve as a precedent. With regard to the practice on these occasions, it is admitted that no such claim was made in 1763, when a similar devolution of the manor to collateral heirs took place; and the officers of the Crown, who have access to all the records of the island, have not been able to bring forward a single case in which this right has been exercised on manors held by the tenure d'haubert. In the absence therefore of all precedent we must revert to the general principles of feudal law. By these we know that the lord upon the death of the vassal was entitled to the possession of his lands, until his heir should redeem them, or relieve them from the lord's hands. In Jersey this right is exercised by the lord either taking the année de succession, or else a relief in lieu of it; but a relief is merely a commutation for the année de succession; no lord can claim both; and in practice wherever the one is taken the other is never paid. The manor of Trinity therefore, by being subject to the relief of sixty sous, is not liable to the année de succession, nor can the Crown demand more than that relief.

Little reliance can be placed on the arguments drawn from the law of England. In no two countries are the feudal burthens or customs similar. In Scotland, for instance, although it derived its feudal laws from nearly the same sources as England, and a statute similar to that of *quia emptores* was

actually enacted there*, yet, as we are told by Dalrymple†, it was so contrary to the genius of the people, that it never was carried into effect, and the law there is at this present moment completely different on that subject from that of its sister kingdom. The burthen however of *année de succession* differs so much from that of *primer seisin*, the one taking place on all deaths, the other only on deaths without leaving lineal heirs, that the ancient feudal law of our own country is completely inapplicable to the subject.

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Pennington, in reply,

observed, that the reason that instances were not produced in which the *année de succession* had been enforced by the Crown on the death of the lords of the five manors held by the tenure *d'haubert* was that the revenues of the island had for many years been farmed to the governors, who had each kept private accounts of their receipts, which they had not returned to the Exchequer.

The MASTER OF THE ROLLS:—

The appellants on the part of the Crown claim to be entitled to what is called the *primer seisin*, or *l'année de succession*, upon a fief, being one of five fiefs in the island of Jersey, distinguished by the name of Fiefs *d'Haubert*. Those who claim a feudal burden are bound to establish, by evidence of the customs of the country where the claim is made, that such a burden does exist. The existence of the

* Scotch Statute, 2 Rob. 1st, c. 25.

† Dalrymple on Feudal Tenures, c. 3d, s. 1st.

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custom in another country affords no legal inference, that it therefore exists in the country in which the claim is set up. Now here there is no evidence upon which a Court can act to establish that such a custom exists, nor does it appear from the whole case before the Court, that this feudal burden has ever been recognized in the island of Jersey. Their Lordships are therefore of opinion that the decree of the Court below must be affirmed; and being a case in which the Crown makes the claim, it is of course affirmed, without costs.

Note.—In Guernsey there are no “Fiefs d’Haubert,” but there are certain seigneuries called “Fiages,” which are held of the king by fealty and homage, and pay reliefs and demi-reliefs. See Approbation des Loix Coûtumes et Usages de l’Isle de Guernesey différentes du Coutumier de Normandie observé en cette isle, ratifié au Conseil Privé le 27me Octre 1583, liv. 5me, cap. 2nd. The authority to which this code (which has been twice published, in 1715 and 1822) refers, on the subject of the relief due for these Fiages, is an extent taken in the reign of Edw. 3. This extent states that the fiefs which owe plein relief pay the king 60 sous 1 denier, those which owe demi relief only half that sum; and it then proceeds, “Item ils (viz. les gens d’enquête) disent que notre Sire le Roy ne prend aucun profit, et n’a coutume de prendre fors le Relief.”

ON APPEAL FROM JAMAICA.

GEORGE HAY DAWKINS PENNANT - *Appellant.*

And

JAMES SIMPSON, WILLIAM TAYLOR,
 SIMON TAYLOR, and WILLIAM } *Respondents.*
 CHRYSTIE - - - - }

Jan. 10th,
 1831.

THE respondents, who were merchants carrying on business in partnership at Kingston in Jamaica, commenced an action of *assumpsit* in October 1828, against the appellant, a gentleman resident in England, but possessed of large landed property in that island.

The first count of their declaration stated, "that the appellant being the proprietor and owner in possession of sundry estates or plantations, named Thomas-River, &c., the appellant of the one part, and the respondents of the other part, did mutually contract and agree with each other, that, in consideration that the respondents would become the merchants, factors and agents in Jamaica of the appellant, and would undertake the factorage of the several plantations, &c., and would furnish all the necessary supplies in goods, monies and otherwise, that might be required for the use of the appellant's said estates, the appellant should and would allow unto the respondents commissions at 5 *l.* per centum on the amount of all such contingences, and supplies, and advances as aforesaid; and that, for the total amount of the several balances which should or might be due to the respondents from the appel-

Attornies to absent proprietors of estates in Jamaica are entitled to only 6 per cent commission as a remuneration for the performance of all the duties of their office, including that of factorage; and if they appoint other persons to be factors, such persons cannot recover either the amount of the supplies they may have furnished to the estates, or of their commission upon them from the proprietors, but must look to the attornies for payment.

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lants at the 31st day of December in each and every year, and interest thereon, he, the appellant, should and would deliver or cause to be delivered to the respondents, in payment thereof, one or more good bill or bills of exchange in the month of August following ; (that is to say) in the course of the month of August next after the 31st day of December in each and every year, at the current rate of exchange in Jamaica, to wit, at such rate of premium of remittance as should be commonly then allowed, and be current on bills of exchange at the time and times such bill or bills should be so delivered ; that they confiding in the promise, &c. did immediately thereupon enter upon the duties of the factorage of the said estates of the appellant, and did pay the contingencies of the said estates, and did furnish all the supplies that were required as aforesaid ; and that on the 31st of December 1827, a large balance or sum of money had become and was due by the appellant to the respondents for such contingencies and supplies, and for interest thereon, and for their commissions as such factors, at the rate aforesaid, to wit, the sum of 20,000 *l.* current money of Jamaica, &c. ; it then alleged notice to defendant of the premises, and request of the performance thereof, and a breach of contract by non-delivery of such bills." The second count stated, " that in consideration that the respondents, at the special instance and request of the appellant, would become the merchants and factors of the appellant, and would undertake the factorage of the estates, &c., and would pay and advance such sums of money for the contingencies of the said estates, as they might be requested to pay on the several original accounts and vouchers

against the said estates being sent to the said respondents properly attested, and would furnish and deliver all such goods, wares and merchandise for the supplies of the said estates, as they might be requested to furnish and deliver, he would allow to the respondents commissions as such merchants and factors at the rate of 5% per cent. on the amount of all sums of money paid and advanced for contingencies as aforesaid, and the value of all goods, wares and merchandise furnished and delivered for supplies as aforesaid; and that for the balance or sum of money due on the 31st of December in each and every year the appellant should draw and deliver good bills of exchange, &c., (in the same words in the first count), and that the appellant would allow the respondents to make use of and apply any monies which should or might be received by the respondents for the use or on the account of the appellant from sales of the produce of such stock of the said estates in aid of the contingencies of the year in which the said monies should be received by the respondents; that they confiding in the said promise and undertaking, did immediately thereupon undertake the factorage, &c., pay and advance monies for the contingencies, &c., and deliver goods, &c. for the supplies, &c.; and that on the 31st of December 1827, a large balance had become and was due by the appellant to the respondents for such sums of money paid and advanced for such goods delivered for supplies, &c., and for interest thereon, and for their commissions as such factors, at the rate aforesaid, to wit, the sum of 20,000*l.*, &c." It then proceeded to state a breach, &c. This declaration also contained the common counts for goods sold

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and delivered, monies lent, monies had and received, and interest and commissions, *quantum valebant*, and an account stated.

The appellant pleaded the general issue, *non assumpsit*. The cause came on to be tried in January 1829 before the Justices of Oyer and Terminer for the county of Surrey. A verdict for 3,657*l.* 15*s.* 11*d.* currency, damages, and 7*l.* 10*s.* 6½*d.* currency, costs, was found for the respondents. A bill of exceptions was tendered to the Judges at the trial, which they allowed; judgment was then entered up for the respondents; a writ of error was brought, in which the common error was assigned, and the parties joined in error. The Court of Errors in the island affirmed the judgment of the inferior Court, and from their decision the present appeal was instituted.

The facts proved at the trial, as they appeared on the bill of exceptions, were briefly as follow: Mr. Pennant, the appellant, by a deed-poll, or power of attorney, dated the 4th of July 1827, and registered the 21st of the following August, appointed J. Laing, G.W. Hamilton, and W. Rose, his attornies, "jointly and severally for him, and in his name to enter upon and take possession of all his plantations and estates in the island; and to hold, enjoy, manage, direct and superintend them, in such manner as might be most conducive to his benefit and advantage, or according to such orders and directions as he should from time to time give; and to appoint overseers, agents, clerks, bookkeepers and other servants, and again at pleasure to remove them, and appoint others in their stead as should be deemed necessary; and to ship and consign all the produce (except such part

of the rum as might be necessary to be sold in the island for contingencies,) or otherwise to dispose of it as he should direct." The deed also empowered Laing, Hamilton, and Rose, to carry on suits and actions, recover debts, submit to arbitrations, and to do all such further other reasonable and lawful acts, deeds, matters and things, as might be necessary to be done in and about the appellant's estates and affairs in the island, as fully and effectually to all intents and purposes as if he were present; and whatsoever they or either of them should lawfully do or cause to be done about the premises, the appellant agreed to allow, ratify and affirm.

Previously to the date of this power of attorney, Laing, Hamilton, and Rose, had acted as attornies to Mr. Pennant. It did not clearly appear whether they had done so under a power of attorney or not, but no power was found recorded in the registers of the colony. During the whole time that they acted in that character Laing took the management of the counting-house department, and acted as what was generally called the factor of the estate, by paying the tradesmens bills and contingencies, drawing bills on England, and settling the accounts; Hamilton managed the planting department; and Rose was the resident attorney upon the estate. Laing, a short time after the date of the power of attorney, entered into negotiations through Mr. Colin M'Kenzie, his confidential clerk, with the respondents, to furnish the supplies, and to undertake the factorage both of his own estates and of various other estates, including the appellant's, of which he was attorney. They at first objected to entering into any agreement on account of the late period of the year, and they

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refused to furnish Laing's own estates at all, unless he kept them in funds for that purpose; finally, however, an arrangement was come to; and in pursuance of it the respondents wrote to Laing the following letter:

Dear Sir, Kingston, 25th July 1827.

With reference to your communication on this subject, we have now to propose the following terms, on which we can undertake the factorage of the estates here specified; viz.:

Thomas-River	-	-	being the estates of G. H. D. Pennant.
Kupius	-	-	
Denbeigh	-	-	
Cotes-Penn	-	-	
Coley Estate	-	-	
Dove Hall Estate	-	-	
Joppa Plantation	-	-	
Albion	-	-	the estates of Sir Alexander Grant.
Retreat	-	-	
Dalvey	-	-	
Berwick	-	-	
Rio Magno	-	-	
Home Castle	-	-	estates of R. H.
Cromwell and Dernock	-	-	Gordon.

Also Sir H. Fitzherbert's and Sir E. H. East's estates, if you find occasion to call on us on their account. We will pay the contingencies of the above-mentioned (on your addressing to us the proper vouchers), and furnish all the supplies that may be required. For the total amount of the several balances due to us at the 31st December, and interest thereon, we are to receive from you bills of exchange in August following, at the current rate;

and any monies received on account of the estates, from sales of produce or stock, are to go in aid of the current contingences for the year. We expect you will make your drafts on us at the periods which are customary, and at such terms as may best suit your own and our convenience. We shall be obliged by your stating in reply to this what may be the probable amounts for which we shall have to provide between this and the 31st December next. Our commission will be five per cent. on the amount of contingences and supplies; and interest will be stated on both sides of the account as usual.—We are, &c.

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To this letter Laing replied the following day :

Dear Sirs, Kingston, 26th July 1827.

I am favoured with yours of 25th, of which a copy is annexed, on the subject of the terms on which you will undertake the factorage of the different properties therein mentioned. To these I consent. In regard to the probable amount that will require to be provided I think the taxes will be about 3,000*l.*, and contingences, not counting supplies, about 9,000*l.*; and all drafts will be made at 30 to 60 days sight, except the small sums for bookkeepers salaries. I remain, &c.

Any orders that Mr. C. M'Kenzie may draw for the above purposes I request you will consider as drawn by myself.

After the receipt of this letter the respondents furnished the supplies of the appellant's estates. Laing's co-attornies, Hamilton and Rose were entirely ignorant of the arrangement between them

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and the respondents until after his death; and although they were aware that there were dealings between him and the respondents, and that the supplies were furnished by the respondents, they declared that they considered the respondents as his agents. It appeared however that Rose had at one time written to the respondents himself, and ordered some supplies for the use of appellant's estates. The attornies always had sufficient means to defray the contingencies of the estate by the sale of cattle, and if those sales did not produce sufficient money, they had the power of drawing bills of exchange on the appellant's merchants or consignees, and such bills were always drawn by Laing & Hamilton. Hamilton declared that he would not have allowed the 5 *l.* per cent. commission to the respondents had it come to his knowledge; that it never had been introduced into the appellant's accounts before, and that Laing would have had to pay it himself. In order to show that the respondents did not consider themselves as factors or agents to the appellant, evidence was also given of a sale of cattle to them by one of the overseers of the appellant's estates, for which they paid by a bill, dated the 11th of August 1827, in favour of Laing, payable 30 days after sight. Laing having died in insolvent circumstances, the appellants instituted the action which gave rise to this appeal against Mr. Pennant.

Pemberton (K. C.), and *Burge*, for the Appellants:—

The contract, which is stated in the respondents declaration, materially varies from that which was produced in evidence at the trial. The declaration

states a contract between the appellants and the respondents; the respondents undertaking to make advances on account of and furnish supplies to the appellants estates, the appellants undertaking to deliver bills of exchange in payment for what would be due on the balance to the respondents for such advances and supplies. The contract produced at the trial, and which is contained in the two letters of the 25th and 26th of July, is a contract between Laing and the respondents; the respondents undertaking to make advances on account of and furnish supplies to the estates of two other proprietors as well as the appellant, and Laing undertaking to deliver to them bills of exchange "on the total amount of the several balances" upon all the estates. The respondents ought therefore to have been nonsuited, because the contract attempted to be proved was the contract set out in their special counts, and they were not entitled to recover on the common counts, because as the payment, according to their own statement, was to have been made by bills of exchange at the current rate in August, and the current rate at that period between Jamaica and England was 90 days, nothing would be due to them in September when they commenced their action.

Independently too of technical objections, the respondents ought not to have recovered upon the merits of the case. The appellant had given a power of attorney to three persons to act for him in the management of his estates in Jamaica; part of the duty of the persons so appointed was to act as factors to the estates under their charge, and for their services as attornies, including those as factors, they were

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entitled to a commission of 6 per cent. The Jamaica statute, 24 G. 2, s. 8, enacts, " that from and after
" the 1st day of January next, which will be in
" the year of our Lord 1752, all commissions of
" attornies or agents of persons absent from this
" island, trustees, guardians, executors and admini-
" strators, arising from their several and respective
" receipts, payments, transactions, management and
" disposal after that time of the rents, profits, pro-
" duce and increase of any of the estates and inte-
" rests for which they are and shall be respectively
" concerned, shall be and the same is hereby re-
" duced to six per cent., including the factorage-
" commission for supplies made in this island for
" such real estates for which such persons shall
" or may be concerned;" and it goes on in a suc-
ceeding paragraph to declare, " that mortgagees in
" possession are not entitled to any commission for
" their management or transactions for or concerning
" such possessions, except what shall be paid to the
" factor for his commission." This statute did not
make a law that the attorney should perform the
duty of factor, but it found the custom to be that he
should do so, and only provided that he should not
charge above a certain per centage for his trouble
both as factor and attorney. It would be in direct
contravention both of that law and of the custom of
the colony, if an attorney who was thus entitled
to receive six per cent. was allowed to appoint a
factor who was to be paid five per cent., and thus
to make his principal liable to pay 11 per cent. If
the attorney does not choose to execute the duties of
his office himself, but to employ another to perform
them for him, the person so employed does not

become the agent of the principal, but of the attorney, and he must look to the attorney for his remuneration. A contrary determination would be most mischievous to the interest of the great body of the proprietors of the island, who are absentees, and would afford a wide opening for frauds of all kinds upon them. Under the present system the principal, although resident in England, is in a great measure safe from imposition. His agent defrays the current expenses and contingencies of the estate either by sales of part of the produce in the island, or by drawing bills on him or his merchant; he can easily, therefore, by the inspection of his agents and his merchant's accounts, see what sums his agent has expended, and in what manner the general management of his estate is carried on; but what check or control can he have over his agent, if that agent is to be held to have the power at his own pleasure of appointing a third person to perform the factorage, and the principal, although (as in the present case) he may know nothing whatever either of him or his appointment, is to be held liable to pay this stranger for the supplies and commission for which he may have previously paid his agent.

But how can it be contended that Laing could appoint the respondents as factors to Mr. Pennant? He was one ~~only~~ of three persons appointed to act as attornies, and consequently as factors. The instrument by which he was appointed was not recorded, and was not therefore of legal effect until after he had written the letters under which they claimed the factorage; neither of the other two attornies joined in the appointment, although both had equal power and

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authority with himself, and so far were they from concurring in it, that they neither of them knew of it, and both of them declared they would not have consented to it had they done so. Had they all three joined in the appointment of the respondents as factors, it would have been invalid, for they had no power of substitution, and they could not have made Mr. Pennant liable for the payment of the supplies furnished to his estates by the respondents on the general ground that they were necessary for its cultivation, because it appears from their own evidence that there were always ample means of providing payment for them, either by drawing of bills on him, or the sale of fat cattle.

It is equally contrary to the general principles of our law, as it is to the custom of Jamaica, that an agent should thus make his principal liable to strangers. When a principal does not know the persons whom the agent employs, there is no privity between them and him ; and the cases of *Schmaling* * v. *Thomlinson*, and *Cull v. Backhouse* †, decide that in a such a case the person employed by the agent must look to the agent for payment, and cannot recover against the principal. But although the appellant did not know that the respondents had been employed by his attorney to furnish supplies to his estate, yet the respondents at the time they entered into the contract with the attorney, knew perfectly that he was an attorney, and that the appellant was his principal, and under these circumstances they chose to consider the attorney as their debtor. Had they intended to consider Mr. Pennant or his estate as their debtor, they would not

* 6th Taunton, 147.

† Ditto, 148, in notis.

have entered into the contract with Laing alone, but with Hamilton and Rose also, both of whom were equally Mr. Pennant's attornies, and equally represented his estate as Laing. They would not at any rate, if they had looked upon Mr. Pennant as their debtor, have paid one of his attornies by a bill for the cattle they had purchased from his estate, but would have placed the value of them on the credit-side of their account with his estate as a set-off against what was owing to them for supplies; they must be considered therefore as having in the first instance given credit to Laing as an agent, with a full knowledge of who his principal was, and consequently cannot, according to the law as established in the cases of *Paterson v. Gandasequi**, and *Thompson v. Davenport*†, now, on Laing's insolvency, charge the appellant for what they originally gave credit to Laing for. In the latter of these cases, Lord Tenterden says, "If at the time of the sale the seller knows not only that the person nominally dealing with him is not principal, but agent, and also knows who the principal really is, and notwithstanding that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then according to the cases of *Addison v. Gandasequi*‡, and *Paterson v. Gandasequi*, the seller cannot afterwards, on the insolvency of the agent, turn round and charge the principal having once made his election at the time, when he had the power of choosing between the one and the other."

Upon every ground therefore the judgment of the Court below ought to be reversed.

* 15 East, 62.

† 9 Bar. & Cres. 78.

‡ 4 Taunt, 574.

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Spankie (Serjeant), and *Rennalls*, for the Respondent:—

The contract which was stated in the declaration was essentially the same as that proved at the trial *Reddendo singula singulis*; there was a clear undertaking on the part of the respondents to supply the estates of Mr. Pennant, and on the part of Laing as Pennant's agent, to pay them for these supplies, and their commission on them in the terms of the special counts. It never could have been the intention of the parties to that contract to render the several proprietors liable for the general balance on all the estates. It evidently was the meaning of it, that each proprietor should be liable for the several balance of his own estate, and a contrary interpretation would amount to an absurdity. As to the objection against recovering on the common counts, it is only necessary to reply, that the appellant was bound to pay by bills of exchange at the current rate in August; if he had given those bills the money would not have been due until the period had expired at which those bills were made payable; but he did not give the bills; he therefore was still indebted to the respondents, and the amount of his debt might be recovered under the common counts.

The next question is, whether this contract was entered into by Laing as the agent of Pennant; and with a view to bind him; and it clearly appears that it was so, for the respondents refused to have any thing to do with Laing's own estate. They therefore did not trust to his responsibility, but to that of his employer. If such was then the understanding of the parties at the time of writing the letters which constitute the contract, the

next subject for inquiry is whether Laing had the power to bind his principal in the way he endeavoured to do by this contract. It has been generally considered as settled law in the West Indies, that the *bonâ fide* furnisher of supplies and advances to an estate is entitled to recover the amount of them against the proprietor, whether there has or not been a contract between them for that purpose. Independently, however, of this general liability the power of attorney was joint and several, and therefore Laing, as one of the attornies acting under it, was fully authorized to pledge the appellant's credit for the benefit of his estates. How could these plantations have been managed, if the supplies and contingencies had not been duly provided for them; and how could they have been provided except by means of factors in the island? Had Mr. Pennant himself been in Jamaica he must have employed factors for his estate, just as Laing (who was a great landed proprietor there,) was obliged to employ one for his own estates, although he was a resident, and acting as attorney for others. In appointing the respondents as agents for the appellant, Laing did not delegate to them his office as an attorney. The offices of attorney and agent are distinct; that of attorney includes the duty of getting in debts, referring difficulties to arbitration, and managing the plantation; none of which were delegated by Laing to the respondents. All that he did was to appoint them as the persons who were to supply the estate, and in fact the greater part of their demand was for supplies actually purchased and furnished; as to that part which consisted of the 5*l.* per cent. commission on the articles furnished, it may very properly be de-

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ducted from Laing's commission of 6*l.* per cent. on the same articles in the account between him and Mr. Pennant, but with that the respondents have nothing to do: as between them and him, he, as Laing's principal, is personally liable to them for payment. The cases of *Paterson v. Gandasequi*, and *Thompson v. Davenport*, can not at all apply here, for the respondents clearly, at the time of making the contract, knew who Laing's principal was, and clearly (as we contend) at that time elected and intended to make that principal their debtor. The Act of Assembly which has been cited on the other side has never before received the interpretation, now, for the first time, attempted to be put upon it. It does not say that the attorney and agent should be the same person, but only that the attorney should not receive more than 6*l.* per cent. commission, including the factorage-commission for supplies. If the attorney performs the duty of factor himself he is entitled to the whole 6*l.* per cent. ; if he procures another person to perform it, the commission of 5*l.* per cent. to the person so employed is to be deducted from that of the attorney. Such has been always the understanding in the island. Both the attorney and the factor are equally agents for certain purposes to absent proprietors, and in two recent cases in the Courts there, *Nicoll v. Markland*^{*}, and *Fitzherbert v. Kinghorn*[†], damages to a considerable amount have been recovered by proprietors against their factors for negligence in not procuring payment for sugars which they had sold ; and in the latter of

* Surrey Assizes, January 1821.

† Surrey Assizes, 18th April 1821. Both this and the preceding case were cited by the counsel from manuscript notes.

these cases the attorney to the estate was one of the witnesses examined on behalf of the plaintiff proprietor. If however the respondents are not to be considered as the agents of the appellant, still the supplies were actually purchased of them by Laing, who undoubtedly was his agent, and they are therefore entitled to recover the value of those supplies from the principal; and the case of *Waring v. Favenck**, decided that the principal could not set off a debt due to him from his own agent against the price of the goods, but that he is still liable for it to the vendor. The arguments that have been used on the other side as to the facility an attorney would have of committing frauds upon his principal, if he was decided to have the power of appointing agents, would apply to every other system of managing estates, if the proprietors do not themselves look after their own interest, and ought to have but little effect on this board, who are bound to decide according to the law as it is, and not, as it may be argued, it ought to be.

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THE MASTER OF THE ROLLS :—

In this case the appellant appears to have paid for various advances and supplies to his estate, and for commissions on them in his account with Laing. Those advances and supplies were in fact furnished to the estate by the respondents. Laing is now dead, and he has died insolvent. The question therefore is, whether Mr. Pennant is personally liable and bound to pay these charges a second time, or whether the respondents are to bear the loss, as the agents of an insolvent person.

* 1 Campbell, 85.

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By the law of the island an attorney is to be paid a commission of six per cent; this, by the plain language of the statute, which enacts that law, is to include his commission as factor. He who undertakes therefore the duty of an attorney is regarded by the law as undertaking also the duty of a factor; he may perform that undertaking either himself or by his agent; and the point to be decided here is, whether the attorney, having in this case constituted an agent, that agent is to be considered as the agent of himself, or the agent of his principal. In the opinion of their Lordships both the Courts below have miscarried in point of justice, by deciding that an agent so constituted is to be considered as the agent of the principal, and both their judgments must consequently be reversed.

MEMORANDA.

IN the case of *In Re the Justices of Antigua* the prayer of the petition presented to the King in Council was, that " His Majesty would be pleased to take the case of his Memorialist into his favourable consideration, and to rescind the order removing his Memorialist from practising at the bar of the island." The words of the Report of the Committee of Council were, " that it might be advisable for his Majesty to dismiss the said petition without costs," which was accordingly done by an Order in Council on the 7th of April 1830.

After the decision in the case of *Elphinstone v. Bedreechund*, the Respondent presented a memorial to the King in Council, claiming the treasure seized as his private property, and praying that his claim might be heard either before a Committee of the Privy Council, or some other competent tribunal to be appointed by His Majesty for that purpose. A Committee of the Council was accordingly appointed, and after hearing, on the 1st and 12th of July 1831, *J. Williams*, K. C., *Stephen*, Serjeant, and *Adams*, Dr. for the Memorialist, *Sir J. Scarlett*, K. C., and *Wightman*, for the Crown, and *Drinkwater*, who obtained leave to appear for the army of the Deccan, Lord *Tenterden* pronounced their decision to be, " That they could not advise His Majesty that the Memorialist had made out his claim."

ERRATA.

- In page 66, in line 2 of note, *for* "confined" *read* "confirmed."
89, line 4 from bottom, *for* "As" *read* "; and as" and line 3 from bottom *dele* "and."
135, between "them" and "accordingly" *insert a full stop.*
275, in line 11 from top, *for* "19th" *read* "26th."
275, in line 3 from bottom, *for* "19th" *read* "26th."
276, in line 10 from the top, *for* "19th" *read* "26th."
269, line 3 from the top, *for* "Supreme" *read* "Recorder's."
304, line 9 from the top, *for* "and" *read* "who."

A N

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P R I N C I P A L M A T T E R S.

ADIATION.

1. In a colony governed by the Dutch law, executors who take no beneficial interest under a will do not, by entering into possession, or adiating the property of a testator, make themselves liable as heirs to the payment of all his debts. [*Freyhaus v. Cramer*]
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2. Paying for the schooling and maintenance of the illegitimate children of a testator, making small advances to their mother, and parting with a boat which was out of repair to the holder of an unpaid note of the hand of the testator, originally given in payment for the boat, are not sufficient dealings with the estate to constitute adiation. [*Freyhaus v. Cramer*] - - - - - *ibid.*
3. A testator having left all his property to his daughter and sole heiress, subject to a *fidei-commissum*, and the daughter having taken possession of all of it, she must be considered to have relinquished her claim to her legitim free

from the *fidei-commissum*. [*Simpson v. Forrester*] - - - - 243

ANNUITY.

1. A. mortgaged an estate in 1774, and his wife joined in the mortgage for the purpose of barring her dower; and he left by his will, in 1775, an annuity to her in lieu of dower. W. the original mortgagee, subsequently mortgaged his interest in this estate to Messrs. R. & Co. In 1786, Messrs. R. & Co. filed a bill against W., and the real and personal representatives of A. for the purpose of obtaining a foreclosure. By a decree in this suit in 1791, a declaration was made that the widow of A. having relinquished her title to dower became a *bonâ fide* purchaser of the annuity, and was entitled to be paid it out of the mortgaged estate. This suit not having been prosecuted, and the widow having died in 1794, her representatives in 1822 filed a bill against the heir of W., and other persons claiming under him, and the heirs and devisees of A., for the payment of

the arrears of the annuity during her lifetime, or that the estate should be sold, and the arrears be paid out of the proceeds. Held on appeal, that the annuity having not been expressly charged on the real estate of A., was a mere pecuniary legacy, and that the decree of 1791 was erroneous, in declaring that the widow was entitled to be paid it out of the mortgaged estate. [*White v. Parnter*] 179

2. The remedies for the recovery of the arrears of such an annuity were held to have been lost by length of time. [*Ditto*] - - - 179

APPEAL.

1. An action is brought against D. as the executor, and also as husband, of the sole heiress, under a will. A few days previously to the final sentence in the Court below D.'s wife dies, leaving him by her will joint heir with her children of her property, and appointing the O. C. guardians of her children. Both D. and the O. C. (who had not previously been parties) petition the Court below for leave to appeal, who refuse it to the O. C. but grant it to D. Held, that the O. C. had a right to intervene after sentence, for the purpose of appealing, and to prosecute their appeal, although the appeal of D. had been dismissed for non-prosecution. [*Orphan Board v. Van Reenen*] - - - 83
2. If an appeal is dismissed on account of the neglect of the guardians of infants to bring it to a decision, the infants, when they

come of age, will have a right to revive it. [*Orphan Board v. Van Reenen*] - - - 83

3. An appellant is not permitted to insist that the judgment against which he has appealed is void for want of parties to the suit in which it was made, the objection not having been taken in the Court below. [*Orphan Board v. Van Reenen*] - - - 83
4. Objections cannot be made to a decree at the hearing before the Privy Council that have not been made in the Court below: *Semble*. [*Frankland v. McGusty*] - 274
5. No appeal will lie from the judgment of a Court below, on the sole ground that it discredited the testimony of the witnesses improperly. [*Santacana v. Ardevol*] 269 [*S. C. Rogerson v. Reid*] - 369
6. Where by his Majesty's instructions all questions relative to the securities to be given in appeals shall be decided by the Court below, and that Court has refused to allow an appeal on account of the insufficiency of the security tendered, the Privy Council will not allow one to be instituted. [*Camberton v. Egroignard*] - - 251
7. An order of council having been made altering the mode of appealing from the colony, and having been directed by a proclamation of the Governor, dated the 14th of May, to take effect from the 18th: Held, that an appeal, which had been noted on the 2d of that month, from a judgment made on the 1st, and on

which the petition to appeal had been presented on the 15th, ought to be prosecuted according to the previous practice, and not according to the order. [*Craig v. Shand*]

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8. In an appeal against the execution of a sentence, the appellant cannot enter into its merits: and by such an appeal the justice of an original sentence is held to be admitted. [*Nieuwerkerk v. Reynolds*] 151

See "PETITION FOR LEAVE TO APPEAL." PRACTICE.

ATTORNEY.

See "PRINCIPAL AND AGENT."

AWARD.

Award invalid if one of the parties to the reference dies before it is made, unless the heirs of the parties are expressly named in the submission to arbitration. [*Orphan Board v. Van Recnen*] - - 83

BANKRUPTCY.

1. A certificate of conformity obtained under a commission of bankrupt in England is a bar to an action for a debt contracted by the bankrupt in Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta. [*Edwards v. Ronald*]

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2. A bankrupt who has assigned his property to his assignee under a French commission of bankrupt cannot afterwards be sued in a

court of justice in the British dominions by one of his creditors for a debt proved under it. [*Quelin v. Moisson*] - - - - - 265

3. The fact of a bankrupt under a foreign commission having absconded, and having been condemned whilst absent by a foreign court to imprisonment and hard labour for a fraudulent bankruptcy, does not give any further right to a creditor to sue him in the British dominions for a debt contracted before his bankruptcy. [*Quelin v. Moisson*] - - - 266

BARON AND FEME.

A wife takes such an interest in the lands of the tenure of Quarterlands, in the Isle of Man, purchased by her husband, that she may, by a will in his lifetime, devise a moiety of them either to him or her children. If she makes such a devise to her husband, he takes them as a devisee under her will, and cannot devise them away from his heir-at-law, as he could have otherwise done. [*La Mothe v. La Mothe*] - - - - - 271

See "RELATIONSHIP."

BARRISTER.

See "JURISDICTION."

COURTS.

See "JURISDICTION."

CURRENCY.

1. A claim made in Demerara for a sum of money, *Holland currency*:

Held to mean the currency of the colony, which is called Holland Currency. [*Hugenholtz v. Watson*]

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2. A plaintiff cannot take out execution for 15 per cent. more than a sum of money, *Hollands currency*, awarded him by a sentence of the Court at Demerara in pursuance of such a claim, on the ground that it was filed for a debt due on a mortgage made in Holland, and that there is the difference of 15 per cent between the *Hollands currency* of Holland and the *Hollands currency* of Demerara. [*Hugenholtz v. Watson*] - 170

DECREE (OF COURT OF EQUITY.)

When a court of equity is called upon to carry into execution a former decree, it is not bound to do so, if, upon inquiry into the merits, it appears to have been erroneous. [*White v. Parnter*]

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DOWER.

Dower can only be recovered by the widow; on her death the claim to it is extinct. [*White v. Parnter*]

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FEUDS.

1. The Crown is not entitled to primer seisin or l'année de succession upon the death, without lineal descendants of a lord of a manor in Jersey held by tenure d'haubert. [*Attorney-General v. Symonds*] 390
2. The existence of a feudal custom in one country, as England, affords

no legal inference of its existence in another country, as Jersey. [*Attorney-General v. Symonds*] 390

FOREIGN JUDGMENT.

Decree of court below for a sum of money due on foreign judgments, reversed on the ground that those judgments had been improperly obtained. [*Frankland v. M'Gusty*]

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See "BANKRUPTCY," 3.

FRAUD.

1. Deeds set aside, the execution of which had been obtained by imposition from an imbecile old man. [*Blachford and wife v. Christian*] 73
2. A degree of weakness of mind far below what would be necessary to justify a commission of lunacy, if it has been taken advantage of to procure the execution of a deed, will be sufficient ground for setting that deed aside. [*Blachford and wife v. Christian*] - - - - ib.
3. Accounts may be opened after a final settlement acquiesced in for five years, if circumstances tending to show fraud in one of the accounting parties are then discovered, and he then agrees to submit them to arbitration. [*Orphan Board v. Van Reenen*] - - 83

JURISDICTION.

(Of Colonial Courts in general.)

The power of colonial courts to prevent advocates who misconduct themselves from practising before them cannot be disputed. [*In re The Justices of the Court of Common Pleas at Antigua*] 267 & 417

(Of Supreme Court at Bombay.)

1. The supreme court at Bombay has no power to issue a writ of *habeas corpus* except when directed to a person resident within those local limits wherein it has a general jurisdiction, or to a person out of those limits who is personally subject to its jurisdiction. [*In re the Justices of the Supreme Court at Bombay*] - - - - - 60
2. The supreme court has no power to issue a writ of *habeas corpus* to the gaoler or officer of a native court, as such officer, it having no power to discharge persons imprisoned under the authority of a native court. [*In re the Justices of the Supreme Court at Bombay*] - 60
3. The supreme court is bound to notice the jurisdiction of a native court without having it set forth specially in the return to a writ of *habeas corpus*. [*In re the Justices of the Supreme Court at Bombay*] 60

(Of Chancellor of Isle of Man.)

When the chancellor of the Isle of Man has referred a case to six members of the house of Keys, chosen by the parties, he is not bound by their decision, but may again refer the case to six other members of his own selection. [*Blackford v. Christian*] - - 73

(Of Court of Appeals at Mauritius.)

The court below at the Mauritius is the sole judge of the sufficiency of the security to be given for the due prosecution of an appeal. [*Camberton v. Egroignard*] - 251

LAW OF NATIONS.

1. The members of the provisional government of a recently conquered country seized the property of a native of it, who had been refused the benefit of the articles of capitulation of a fortress of which he had been governor, but had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a considerable distance from the scene of actual hostilities: Held, that the seizure having been made *flagrante, et nondum cessante bello*, must be regarded in the light of a hostile seizure, and that a municipal court had no jurisdiction on the subject. [*Elphinstone v. Bedreechund*] - - - - - 316
2. The circumstances that a recently conquered city, where a seizure of the property of a native is made by the members of a provisional government during time of war, had been for some months previously in the undisturbed possession of that government, and that courts for the administration of justice were then sitting in it under the authority of that government, do not alter the character of the transaction so as to make it a subject of cognizance by a municipal court. [*Elphinstone v. Bedreechund*] - - 316
3. There is no distinction between the public and private property of an absolute monarch. [*Advocate-General of Bombay v. Amerchund*] 329

4. Money in the hands of the banker of an absolute monarch, whose territory has been conquered by the British, may be recovered from the banker on an information on behalf of the Crown. [*Advocate-General of Bombay v. Amerchund*] - - 329

LEGITIM.

- It is not incumbent on an heir to accept his legitim or pars legitima of an inheritance in a colony governed by the Dutch law for the benefit of his creditors. [*Simpson v. Forrestcr*] - - - - 231

LIMITATION (STATUTES OF.)

1. The construction put upon the statutes of limitation is more liberal now than formerly. [*White v. Parnter*] - - - - 226
2. Whenever a court of common law will presume a debt to have been satisfied, unless there be some circumstances to rebut the presumption, a court of equity will act on the same presumption. [*White v. Parnter*] - - - 228

MORTGAGE.

1. A covenant in a mortgage of property in the West Indies to consign the produce of the mortgaged estate to the mortgagee is not usurious. [*Sayers v. Whitfield*] 133
2. A mortgagee in possession is entitled to the benefit of this covenant, and may charge commission on the sale of the produce of the mortgaged estate. [*Sayers v. Whitfield*] - - - - 133

3. On the assignment by a mortgagee in possession, those supplies and contingencies which were due before the assignment being paid by the assignee, may be added to the mortgage-debt, and charged against the mortgaged premises. [*Sayers v. Whitfield*] - - 133
4. On a mortgage in the colonies governed by Dutch law, interest exceeding in amount the principal cannot be recovered. [*Shand v. Brereton*] - - - - 162
5. The assignee of a mortgage of a plantation in a colony governed by the Dutch law, may enforce a covenant in the mortgage-deed to consign the produce to the mortgagee, by obtaining a mandament of penal interdict, forbidding the mortgagor from consigning it to any other person. [*Shand v. Brereton*] - - - - 161
6. The mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shown that there is collusion between them and the mortgagees. [*White v. Parnter*] - - - 179

PARTNERSHIP.

1. Bills drawn by one partner for a separate debt in the partnership name cannot be recovered upon as against the firm, unless the plaintiff can prove either a direct assent from the other partners, or circumstances from which such assent might have been reasonably presumed. [*Frankland v. M'Gusty*] - - - 274
2. In taking the accounts of three partnerships, the first of A. and B.,

the second of A. B. and C., and the third of B. and C., the latter partnership of B. and C. cannot charge commission for collecting the debts due to the two preceding partnerships. [*Whittle v. M'Farlane*] 311

PETITION FOR LEAVE TO APPEAL.

1. Where a Court below has granted leave to appeal in a case in which they were not authorized by their charter to do so, it is not sufficient for the appellant to present the common petition of appeal, but he must present a special petition for leave to appeal to the King in Council. [*East India Company v. Syed Ally*] - - - - - 331
2. Where a party has lost his right of appealing according to the charter of a court below, through the erroneous construction of it by the officers of that court, the Privy Council will upon a special application grant him leave to appeal. [*East India Company v. Syed Ally*] 332
3. Petition for leave to appeal need not be presented to the King in council within a year after leave to appeal has been refused by the court below. [*Orphan Board v. Van Renen*] - - - - - 83
See "APPEAL." "PRACTICE."

PENAL INTERDICT.

A mandament of penal interdict ought not to be granted to restrain the execution of a sentence upon grounds that might have been brought forward at the hearing of

the cause. [*Nieuwerkerk v. Reynolds*] - - - - - 151

PERPETUUM SILENTIUM.

A decree of *Perpetuum Silentium* against the creditors of a person deceased, who have not appeared and put in their claims under an *edictal* summons for that purpose, is not a bar to an action against his executor by a creditor who has not so appeared. [*Freyhaus v. Heirs of Forbes*] - - - - - 117

PRACTICE.

1. The Privy Council will not direct a greater security to be entered into by an appellant, on granting him leave to appeal, than it had been the practice to require in the colony, although the instructions to the governor may empower him to require greater. *Sembla*. [*Craig v. Shand*] - - - - - 253
2. When the Privy Council has sent a reference to a court below for them to certify, as to a point of their practice, their certificate cannot be disputed, unless a petition praying for a fresh reference is presented, and supported by affidavits disputing the accuracy of the certificate. [*Le Quesne v. Nicolle*] - - - - - 257
3. An unsworn certificate of deputy secretary in St. Vincent's, that he had searched the secretary's office, and could find no warrant of attorney to confess judgment in an action, received as evidence of the non-existence of such a power, having been admitted as such in

- the court below. [*Frankland v. M'Gusty*] - - - - - 274
4. Although the general rule in the Privy Council is not to condemn the appellant to pay the respondent's costs, where the judgment of the court below is altered on appeal, yet where the appellant might have obtained the alteration in the court below, which was afterwards made upon appeal, and the general principle of the judgment below was confirmed, he was ordered to pay the respondent's costs. [*Bertram v. Godfray*] - - - - 48

PREScription.

The possession necessary to constitute a title by prescription must be uninterrupted and peaceable, both according to the law of England, the civil law, and those of France, Normandy, and Jersey. [*Benest v. Pipon*] - - - - 61

PRINCIPAL AND AGENT.

- A commission to sell and transfer stock "when the funds should be at 85 per cent. or above that price," is a particular commission under which an agent is bound to sell when the funds reach 85, and has not a general authority to act for his employer, so that he may defer selling until the funds reach a higher price than 85. [*Bertram v. Godfray*] - - - - - 481
2. A mercantile house that had accepted a commission "to sell stock when the funds should be at 85, or above that price," held in

equity to have made the stock their own from that time, and ordered to account to their employer for the price of it with interest, he in return accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price. [*Bertram v. Godfray*] 481

3. Attornies to absent proprietors of estates in Jamaica are entitled to only 6 per cent. commission as a remuneration for the performance of all the duties of their office, including that of factorage; and if they appoint other persons to be factors, such persons cannot recover either the amount of the supplies they may have furnished to the estates, or of their commission upon them from the proprietors, but must look to the attornies for payment. [*Pennant v. Simpson*] - - - - - 399

RELATIONSHIP.

The relationship which is formed by marriage is not dissolved by the death of one of the parties without issue, so that a husband whose wife had died childless cannot afterwards sit as a judge in a cause to which her nephew is a party. [*Becquet v. Lemprière*] - - 376

RENUNCIATION (Law of, in Jersey).

See Note to Page 392.

ROYAL COURT (of Jersey).

See Note to Page 378.

SEA COAST.

1. The lord of a manor cannot establish a claim to the exclusive right of cutting sea-weed on rocks situate below low-water mark, except by a grant from the King, or by such long and undisturbed enjoyment of it as to give him a title by prescription. [*Benest v. Pison*] 61
2. The sea is the property of the King, and so is the land beneath, except such part as is capable of being occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has exclusively used for so long a time as to confer on him a title by prescription. [*Benest v. Pison*] - - - - - 68

SHIPPING.

1. A mercantile house at Newry directed a house at Quebec to contract for the building of a ship, for which they (the Newry House) would send out the rigging. The Quebec House entered into a contract with some shipbuilders accordingly. The Newry House then directed their correspondent at Liverpool to send out the rigging: he did so; and it having been actually delivered to the Quebec House, Held that the property in it was vested in the Newry House, and that the Quebec House had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom-house expenses on the

landing of it, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house. [*Rogerson v. Reid*] - - - - 302

2. A voyage from Calcutta to Canton in ballast, and from thence to the Cape of Good Hope, under a license from the Governor-General of India, "to proceed in ballast from Calcutta to Canton, to there take in a cargo, and deliver it on shore at Calcutta, or on shore at any intermediate port or ports in the course of the voyage, and not elsewhere," is illegal, and cannot be justified under the terms of such a license. [*Balston v. Bird*] 121
3. Masters of ships trading "under the Act 54 Geo. 3, c. 34," between places within the East India Company's charter, are bound to produce manifests in the form directed by the 53d Geo. 3, c. 155, and 27th Geo. 3, c. 52. [*Balston v. Bird*] 121
4. The East India Company cannot grant a license to trade from Canton to the Cape of Good Hope. *See* [*Balston v. Bird*] 121

SUPPLIES AND CONTINGENCIES.

See "MORTGAGE," 3.

VENDOR AND PURCHASER
(in Jersey).

1. A purchase made within forty days previously to the death of

- the vendor, set aside by his heir, such purchases being void by the law of Jersey. [*Marett v. Jennes*] 103
2. The purchaser under such circumstances cannot call upon the heir to repay him the purchase-money, but must recover it as he can from the persons to whom it has been given by the deceased vendor. [*Marett v. Jennes*] 103
3. The receivers of the purchase-money ought to be made parties to a suit for the recovery of property sold under such circumstances. *Semble*. [*Marett v. Jennes*] 103
- in execution and sell it. [*Simpson v. Forrester*] - - - - - 231
3. Where a Hindoo testator directed a religious work to be performed at one place, and a temple to be built at another, held that it did not follow that the work at the first place meant the erection of a temple, and referred to the Master to inquire whether there was any religious buildings amongst the Hindoos less expensive than a temple. [*Mullick v. Mullick*] 245
3. Where a testator directed a ghaut to be built, referred back to the Master to inquire whether by the usage of the Hindoos it was necessary that it should also be consecrated. [*Mullick v. Mullick*] 245
4. Where a testator made two of his sons his executors, and directed that when they should perform a religious or other act they should give notice to their brothers, and they should all perform the act, otherwise whatever the executors might think proper they should do, and should any one raise objections to it they should be inadmissible: Held that it did not give the executors an unlimited discretion in spending the testator's fortune in religious ceremonies. [*Mullick v. Mullick*] - - - - - 245

WILL.

1. Devise of property, real and personal, after the death of the testator's wife, to be sold, and the money arising therefrom to be immediately deposited in the Bank of England, the interest of which was to be paid to the testator's daughter during her life, and the principal wholly at her disposal at her death: Held not to give the daughter, who was a married woman, such an absolute interest in the property, that her husband's creditors might in a colony governed by the Dutch law take it

